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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1906.

VOLUME LXXVII.

HARRY C. LINDSAY,
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HENRY P. STODDART,
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BY HARRY C. LINDSAY, REPORTER OF THE SUPREME COURT,

In behalf of the people of Nebraska.

DEC 14 1908

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CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
AT
JANUARY TERM, 1906.

STATE, EX REL. WILLIAM SUMPTION ET AL., RELATORS, V.
JOHN SMITH ET AL., RESPONDENTS.

FILED JUNE 20, 1906. No. 14,614.

1. **Repairs of county bridges** contemplated by sections 114 and 115 ch. 78, Comp. St., are such as may be made at once, and without considerable cost.
2. **Bridges: REPAIRS: MANDAMUS.** The boundary line between Colfax and Butler counties is the south bank of the Platte river, which flows between those counties. The bridge over the river between these counties was rebuilt in 1904 at a cost of about \$22,000. In the following spring, by the movement of ice in the river, nearly one-half of the bridge was carried away. In an action of mandamus to compel the supervisors of Colfax county to repair the bridge, it is held that the action cannot be maintained without notice to both counties under section 116, ch. 78, Comp. St., and the counties must be joined in the action.

ORIGINAL application for a writ of mandamus to compel respondents, as county supervisors, to repair a bridge.
Writ denied.

George W. Wertz, for relators.

C. J. Phelps, for respondents.

SEDGWICK, C. J.

The relators applied to this court for a writ of mandamus to compel the respondents, who are the supervisors

of Colfax county, to repair a bridge across the Platte river between that county and Butler county, and to place the same in condition for public travel, and to care for and preserve the material of which said bridge was constructed. The decision of the case is placed mostly upon propositions of law, and for an understanding of the principles involved the issues are sufficiently stated in the findings of fact. The matter was referred to the Honorable John J. Sullivan to take the evidence and report findings of fact and conclusions of law. His findings of fact are as follows:

"First. That the bridge in question was constructed in the fall of 1904 at a cost of about \$22,000. The bridge consisted of 112 spans; 110 spans 24 feet long, and two spans 20 feet long. It was a pile bridge, the piles being from 16 to 32 feet in length, the average length of the piles being 24 feet. The height of the decking above the water was between 7 and 8 feet. The piles were driven in the sand and did not reach hardpan. During the outflow of ice in the spring of 1905, 44 spans of the superstructure were entirely carried away, and 75 piles were also carried away, 33 spans were more or less injured, leaving of the 112 spans only between 50 and 60 spans intact. To reconstruct and repair the bridge so as to make it passable would cost about \$2,700. To restore it to its original condition would cost about \$5,000. This bridge (and its predecessors) is on the public road extending from Colfax county into Butler county, and is used chiefly by the citizens of Butler county to reach the city of Schuyler. Heretofore the entire expense of building and repairing this bridge and its predecessors has been borne by Colfax county, Schuyler precinct, and the citizens of Schuyler. The bridge was completely carried away during the outflow of ice in the spring of 1883, and again in 1903, and parts of it have been washed out and injured very frequently since the construction of the original bridge in 1871. The permanency of this bridge, if restored to its original condition, depends entirely upon the character of the breakup and outflow of ice in the spring. It might not stand for

more than a year, and it might stand for several years. This is a matter that is altogether problematical and cannot be determined in advance. Second. That the south bank of the Platte river is the dividing line between Butler and Colfax counties. The north end of the bridge is in Colfax county, and the south end of the bridge is in Butler county. Third. The bridge in question is the only bridge across the Platte river for a distance of 15 miles on either side. Fourth. There are sufficient available means at the disposal of respondents to enable them, after rebuilding and repairing all other bridges in the county that stand in urgent need of immediate reparation, to rebuild, reconstruct, repair and make passable that part of the Platte river bridge which was washed out and damaged in 1905. But, respondents have not sufficient means, after doing the immediately necessary work of reconstruction and reparation of smaller bridges, to reconstruct and repair the Platte river bridge in such a manner as to afford any reasonable expectation that the new structure would be permanent, or any persuasive probability that it would even withstand the next breakup and outflow of ice. Fifth. The refusal of respondents to rebuild and repair is not grounded upon or justifiable by the lack of means to make the bridge passable, but is, in part, grounded upon the lack of means to make it passable and probably permanent. They think it unwise and inexpedient to exhaust their available resources in the erection and reparation of a structure which according to the evidence might not stand for a year, and under the most favorable conditions would probably not stand for more than a few years. Sixth. Respondents had actual knowledge of the condition of the Platte river bridge long before this action was instituted, and they had refused to repair it, although frequently requested so to do by a large number of the citizens of Schuyler. Seventh. The notice mentioned in section 114, ch. 78, Comp. St. was given by relators to respondents before this action was commenced, but it does not appear that any such notice was ever given to the

county board of Butler county or to any member of that board."

The referee's conclusion of law upon these facts was: "First. That the duty to repair the Platte river bridge is a joint duty imposed by statute upon Butler county and Colfax county, and cannot therefore be enforced by mandamus without giving the notice required by section 116, ch. 78, Comp. St. Second. That the repairs contemplated by sections 114 and 115, ch. 78, Comp. St., are repairs of such a slight character that they may be made at once and without any considerable cost. Third. That the peremptory writ of mandamus should not be granted."

The reasons given by the referee in the opinion accompanying the report appear to justify the conclusions reached. They are as follows: "By section 87; ch. 78, Comp. St., the cost of building and maintaining bridges like the one here in question must be paid by the counties in which they are situate. The next section provides that the counties whose duty it is to build or repair any such bridge 'may be proceeded against jointly' for any neglect of duty in relation thereto. Sections 114, 115 and 116, ch. 78, Comp. St., provide that it shall be the duty of adjoining counties to commence repairing bridges on the line between them within 24 hours after notice has been served by three citizens or taxpayers of the state upon the member of the county board of each county in whose district part of the bridge is located. These statutory provisions seem to indicate quite clearly a legislative policy that the joint duty with respect to bridges on the dividing line between counties should be enforced by action against both counties. The wisdom and justice of such a policy is, of course, an argument in favor of its existence. While the act of 1889 (sections 114, 115, 116 and 117) seems to impose an absolute duty to repair immediately upon notice, any bridge on the line between adjoining counties, it must, I think, be subjected in construction to such limitations as will bring it into harmony with other provisions of the road law. If repairs are to be made under the act of 1889

without opportunity for competitive bidding, the legislature must have had in contemplation such repairs as might be rightfully so made under preexisting statutes. It could hardly have been the intention of the legislature to authorize a single commissioner to create an obligation that might, perhaps, amount to thousands of dollars against his county, or to require him to commence within 24 hours after notice a work of any considerable magnitude. This view is strengthened by section 85, ch. 78, Comp. St., which authorizes the county board, in cases of pressing necessity occasioned by extraordinary high water or other causes, to declare an emergency, and proceed at once to buy materials and hire labor for the repair of bridges. This latter statute was evidently intended to meet a condition not covered by the act of 1889, to create a power not previously existing. It authorizes, in cases of great necessity, as I understand it, the expenditure of large sums of money upon bridges, without advertisement or competitive bidding. The case of *Dutton v. State*, 42 Neb. 804, cited by counsel for relators, does in part support their claims, but it overlooks entirely the proposition established by later decisions that a bridge between counties is an indivisible unit within the meaning of the law relating to the cost of constructing and repairing such bridges. The author of the opinion does not seem to give much attention to the provisions of the statute bearing upon the point decided, and I cannot believe the conclusion reached is either just or in accord with the intention of the legislature."

The relators filed exceptions to the findings of the referee. The first exception relates to the sufficiency of the evidence to support the finding that it would cost about \$5,000 to restore the bridge in question to its original condition. It is unnecessary to discuss the evidence upon this point, since there is no doubt under this evidence that the repairs necessary to put this bridge in its original condition, or even in a passable condition, would be much greater than the repairs contemplated by sections 114 and 115, ch. 78, Comp. St., referred to in the referee's

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second conclusion of law. The other exceptions of the relators relate to the conclusions that the duty to repair the bridge is a joint duty imposed by statute upon both counties, and that this duty cannot be enforced by mandamus without giving the notice required by section 116 of said ch. 78.

We think that the reasons given by the referee are sufficient to justify these conclusions. It follows that the relators were not entitled to the relief demanded, and the writ is therefore denied.

WRIT DENIED.

SOUTH OMAHA NATIONAL BANK V. HARRY E. MCGILLIN
ET AL.

FILED JUNE 20, 1906. No. 13,578.

1. **Chattel Mortgages: VALIDITY.** A chattel mortgage on a specified number of cattle, describing them by age and brands, and reciting that "the above described stock are in my undisputed possession, free from all liens and incumbrances, and kept on my premises on section No. 4, township No. 5, range No. 38, Chase county, Nebraska," is not void on its face for uncertainty of description.
2. ———: ———. If it is made to appear that such mortgage was in fact given on a specified number of cattle out of a larger number of the same kind and description, or, in other words, on a part only of a herd of cattle of the same kind and bearing the same description, it is void as to third persons, unless there has been a separation or a delivery of the cattle mortgaged to the mortgagee.
3. ———: **SELECTION.** While such a mortgage is void as to third persons, it is not void between the parties thereto. It gives to the mortgagee the right of selection, and, when he has exercised that right, the lien of the mortgage attaches and will prevail over all after acquired interests in the mortgaged property.
4. ———: **PRIORITIES.** When two such mortgages are executed on parts of the same herd of cattle, the mortgagees have an equal right of selection, and the one first exercising that right is entitled to the possession of the cattle so selected by him, to the exclusion of the rights of the other, if need be.

5. ———: **ASSIGNMENT: PRIORITIES.** If, however, the mortgagee in such mortgage transfers the same to a third party, and afterwards takes the second mortgage on the same description of property, he takes his right of selection subject to the right so transferred to the first assignee. And if he afterwards assigns the second mortgage, such assignee will take no greater right than his assignor had.
6. **Instructions announcing a contrary rule disapproved.**

ERROR to the district court for Chase county: **ROBERT C. ORR, JUDGE.** *Reversed.*

Brome & Burnett and A. G. Ellick, for plaintiff in error.

McCoy & Olmstead, contra.

BARNES, J.

One Harry McClelland was engaged in buying, selling and raising cattle on a ranch situated in Chase county, Nebraska. For the purpose of furthering his business he borrowed money from the Shelley-Rogers Commission Company of South Omaha, Nebraska, to whom he gave his four promissory notes, secured by chattel mortgages upon cattle which he described as in his possession and on his ranch. The first note was for \$3,531.51, dated April 19, 1902, due November 7 following. The mortgage securing this note was on "eighty-one head of four year old steers, branded one or both of the following brands: — or H." The second note was for \$3,099, dated September 5, 1902, due April 9, 1903. The mortgage securing this note was on "ninety-three head of cattle, described as follows: All two and three year old steers, branded — on right hip." The third note was for \$2,832.62, dated October 13, 1902, due April 23, 1903, and the mortgage securing this note was on "one hundred eleven head of cattle of the following description: All long two year old steers, branded — on right hip." The fourth note was for \$4,681.35 dated October 30, 1902, due May 8, 1903, and the mortgage securing it

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was on "one hundred sixty-two head of cattle, to wit: 85 steers, four years old, branded 2 or H, ave. 1175 ; 11 steers, two years old, branded — on right hip; 8 steers, one year old, branded — on right hip; 19 cows, five to six years old, branded Dd or H; 27 heifers two years old, branded — on right hip; 12 calves of 1902 (six steers, six heifers)." Each of the mortgages contained the following: "The above described stock are in my undisputed possession, free from all liens and incumbrances, and are kept on my premises on section No. 4, township No. 5, range No. 38, in Chase county, Nebraska." The mortgages were all duly filed in the office of the county clerk of Chase county on or about the date of their execution. The first two notes, together with the mortgages given to secure their payment, were assigned before maturity, for a valuable consideration, to the South Omaha National Bank, and it appears that there was due and unpaid upon them at the commencement of this action the sum of more than \$6,000. The two notes and mortgages last above described were sold and assigned to the Commercial National Bank of Fremont, for value, before maturity, and the evidence shows that neither of them had been paid when this action was commenced. All of the notes were indorsed or guaranteed by the Shelley-Rogers company, which became insolvent or failed and went out of business in the spring of 1903. After such failure the agent of the Commercial National Bank of Fremont went to McClelland's ranch and took possession, with his consent, of 134 head of cattle, there found, under and by virtue of its mortgages. Among the cattle so taken were 99 head, which in some measure answered the description contained in the two mortgages first above described. The South Omaha National Bank thereupon demanded possession of the cattle, which it claimed were described in its said mortgages, and, being refused such possession, instituted a suit in replevin against the Commercial National Bank of Fremont, Harry McClelland and Harry E. McGillin, in whose possession the cattle were found. The two last named persons disclaimed any inter-

est in the property, and the suit proceeded between the two mortgagees. On issues properly joined a trial was had to a jury, which resulted in a verdict in favor of the defendant. There was a judgment on the verdict, and the plaintiff brings the case to this court by petition in error.

There was nothing which appeared upon the face of the mortgages which would render any of them invalid. The defendant, however, on the trial below claimed that the mortgages held by the plaintiff were void for uncertainty of description, and attempted to show that at the time they were executed there was a greater number of cattle on McClelland's ranch, bearing the brands and corresponding to the ages of the cattle described in the plaintiff's mortgages, than were covered by those instruments. In other words, that each of the mortgages covered but a part of a herd of cattle bearing the particular brands and corresponding to the ages of the cattle described therein. And it may be stated that, had the testimony clearly established such fact, then as to third persons the mortgages would have been void for uncertainty of description. An examination of the record shows that McClelland, by his testimony, attempted to aid the defendant in rendering the plaintiff's mortgages void, but in our minds it is doubtful if his evidence was sufficient to accomplish that purpose. He testified that he was doing a large business, and had from 500 to 600 cattle on his ranch most of the time; that he was constantly buying and selling. But, when asked if he had more than 81 head of four year old steers, branded "—" or "H," on his ranch at the time he executed the first mortgage, he was unable to say positively that he had any more than that number. The same may be said as to his evidence in regard to the 93 head of three year old steers, branded "—" on right hip, as described in the plaintiff's second mortgage. We do not deem it advisable, however, to state our view of the weight of this evidence, for the reason that the case may be tried again, and the question thus raised is one that should be submitted to, and left for, the determination of the jury under proper instructions.

If, when McClelland executed plaintiff's mortgages, he had no more cattle on his ranch of the age, kinds and brands set forth and described therein, then the mortgages were not void for uncertainty, and the plaintiff has a prior lien on so many of the cattle in controversy as were covered by said mortgages. *Peters v. Parsons*, 18 Neb. 191; *Wiley v. Shars*, 21 Neb. 712. If, on the other hand, McClelland had in his possession and on his ranch a greater number of cattle of the same brand, kind and description as those described in the plaintiff's mortgages at the time of their execution, or, in other words, if the mortgages described only a part of his herd of cattle of the same kind, brands and ages, quite another question is presented. We are satisfied from an examination of the authorities that a mortgage of the kind above described is void for uncertainty of description as to third persons, but is not void between the parties thereto. While it is not a completed instrument, in that the lien of the mortgage is not fixed and established, yet it gives to the mortgagee, or his assignee, the right of selection, and, whenever he has exercised that right and made such selection, a valid mortgage lien is thereupon created by virtue of such instrument and the selection made thereunder.

It will be borne in mind that all of the mortgages were given to the Shelley-Rogers Company. After the assignment of the mortgages to the plaintiff, the mortgages which were assigned to defendants were taken. If the mortgagor had as many cattle of the same kind, brands and ages as were described in both mortgages, then the mortgagees would have equal rights of selection. If after the mortgagee had obtained a right of selection under his first mortgage, and had assigned that right to the plaintiff, he took another mortgage which gave him a further right of selection from the same descriptions of cattle, this right would be subject to the right of selection which he had assigned in the first mortgage, and he could transfer to the second assignee no greater right than he himself possessed. In such case, the assignee of the second mortgage would

acquire the right only to select the number of cattle of the common description in excess of the number which the assignee of the first mortgage would be entitled to select thereunder. If both have equal rights of selection, the one who first exercises his right of selection will obtain a priority of lien on the property described in common in the two mortgages. *Brittain D. G. Co. v. Blanchard, Shelley & Rogers Co.*, 60 Kan. 263, 56 Pac. 474; *Avery v. Popper & Bro.*, 92 Tex. 337, 48 S. W. 572.

It appears from the evidence, without dispute, that the officer in executing the order of replevin herein found and took from the possession of defendants 11 or 12 five year old steers. None of these were, or could be, in the nature of things, covered by either of the defendant's mortgages. The officer also found and took possession of 34 head of four year old steers. Now, if these steers were branded only with a bar on the right hip, the jury might have found from the evidence that they were animals covered by the plaintiff's second mortgage. It is clear from reading the descriptions contained in the defendant's mortgages that none of these animals could be covered thereby. So that, even if the defendant had obtained a priority by reason of first exercising its right of selection, yet such right did not extend to the selection of cattle not embraced, described in, and intended to be covered by its mortgages. So it would seem from the evidence taken at the trial that, as to at least 11 head of five year old steers and 34 head of four year old steers, the plaintiff may have been entitled to recover. With the evidence in this condition, the court instructed the jury, in substance, that the description of the cattle in plaintiff's chattel mortgages should be such as to enable third parties to identify them, aided by such inquiry as each mortgage indicated; and that, if McClelland owned and had in his possession on the premises described in said mortgages a large number of steers of a very similar description as those described and enumerated in either of the plaintiffs mortgages, then they should find for the defendant. It seems clear that this instruction

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was not warranted by the evidence. The court also gave other instructions which are inconsistent with the rules above announced and constitute reversible error.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

OMAHA LOAN & BUILDING ASSOCIATION ET AL., APPELLEES,
V. HORATIO K. HENDEE ET AL., APPELLANTS.

FILED JUNE 20, 1906. No. 13,980.

1. **Judicial Sale: CONFIRMATION.** It is ordinarily the duty of a court, where a judicial sale is fairly conducted and is made in conformity with the decree, to ratify such sale.
2. ———: **VACATION.** The foregoing rule, however, is subject to certain exceptions; and, where it is made to appear that there was a misunderstanding between the parties, by reason of which one of them was prejudiced without fault on his part, the court, in the exercise of its equity jurisdiction, may deny confirmation and set aside the sale.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Reversed with directions.*

McDonald & Woodland, for appellants.

Charles W. Haller and Charles S. Lobingier, contra.

BARNES, J.

This controversy arises over an order of the district court for Douglas county confirming a sale of real estate made under a decree of foreclosure of that court. It appears that in March, 1900, the appellants went into possession of the real estate in question, the same being a house and lot in one of the additions to the city of Omaha, under a contract of purchase with one G. S. Benewa; that

they paid a considerable part of the purchase price, and that an arrangement was finally made between them and Benewa, by which he took the title to the property, obtained a loan thereon from the Omaha Loan & Building Association, the appellants agreeing to pay the loan according to its terms, and, when the same was paid, Benewa was to deed the property to them. Since taking possession of the premises the appellants have at all times claimed and occupied the same as their homestead. For a failure to make the payments due to the building and loan association, an action was instituted in the district court, and a decree of foreclosure was rendered therein in favor of said association and against Benewa and the appellants. The execution of the decree was stayed for nine months on application of the appellants, and, when the stay was about to expire, they entered into negotiations for the purpose of obtaining a loan on the premises with which to pay off and satisfy the decree. Such negotiations resulted in the purchase of the decree by Mr. Lobingier, who took an assignment of the same, together with all of the rights of the plaintiff thereunder. The decree seems to have remained *in statu quo* until the month of October, 1903, when the decree was assigned to Ida M. Cronk, and, without further notice to appellants, an order of sale was issued thereon. The premises were sold on the 10th day of November, 1903, and notice was given to the appellants of the hearing of an application to confirm the sale on the 19th day of March, 1904. The appellants appeared, resisted the motion for confirmation, and filed objections thereto, duly verified, which in form and substance amounted to a petition to set the sale aside on account of fraud and misrepresentation practiced upon them.

The allegations contained therein are in substance as follows: That in September or October, 1902, the appellants entered into an agreement with the assignee of the decree, by the terms of which they were to pay \$12.50 a month; that said payments were to be applied, first, upon

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the interest on the sum paid for the assignment of the decree in question, together with taxes and costs; second, upon repairs made upon the premises; and, third, upon the principal of the loan or payment made for them by said assignee; that, when the principal sum so paid for the decree was reduced to \$750, said assignee was to give them a title to the premises, and take a mortgage thereon to secure the payment of that amount; that, pursuant to the agreement, they made the payments therein stipulated up to and including the month of January next preceding the application to confirm the sale; that it was agreed by the said assignee that no sale of the premises should be ordered, and, when they made their November payment in 1903, they were told that no notice of sale had been ordered to be made; that the assignee was not going to have the premises sold, and would not have them sold so long as the payments were made according to the terms of the agreement. They further charged that said representations and statements were false and fraudulent, and made for the purpose of misleading and deceiving them; that said assignee well knew at the time that an order of sale had been issued, and notice thereof had been inserted in the "Royal Woodman" in each of the issues of the paper published in the month of October preceding; that said statements did mislead and deceive them; that they did not know that notice of sale had been published, and did not know that the sale had taken place, until notice of the motion to confirm the same was served upon them. They further alleged that at the time they made their November payment they told said assignee that they did not want to make a payment in December, but would make payment for two months in January following; that such payment was made in January, and they would not have made the same had they known that the premises had been sold. They further alleged that they would have inquired as to such sale but for the misrepresentations so made to them by said assignee; that, by reason of the action taken by said assignee in ordering the sale of the

premises, the agreement between them was broken; that appellants were taken by surprise to their damage and injury, and for that reason the sale was irregular and void, and should be set aside. They prayed for an order vacating the sale and holding it for naught; that an accounting be had, and an order entered allowing them sixty days within which to pay the amount found due into court, and that upon such payment a deed be made by the sheriff to them and the premises thus conveyed to them without further action of the court. The assignee of the decree accepted the issue thus tendered, and a hearing on the merits was had upon affidavits and other documentary evidence. Whereupon, the trial court overruled the objections of the appellants, and made an order confirming the sale. The case comes here by appeal for a trial *de novo*.

Under the present statute, and our rules governing appeals in equity cases, we are in no manner bound by the view of the trial court as to the sufficiency or the weight of the evidence, where it consists wholly of affidavits, depositions, and other written testimony. In the instant case, no oral evidence was taken, and we are therefore in as good a situation to judge of the weight and probative force of the testimony as was the trial court. Section 681a of the code; *Grandin v. First Nat. Bank*, 70 Neb. 730; *Faulkner v. Simms*, 68 Neb. 299. We desire to say, before proceeding further with this opinion, that it would seem that a question of this importance should not be tried on a motion and affidavits only; that, where such objections are presented, the district court should require pleadings to be filed, direct an issue to be made up, and upon such issue proceed to trial as in other cases. In this case, however, the parties having elected to proceed on the motion and by affidavit evidence, and having so tried the issue without objection, we have concluded to take the case as we find it, and decide anew the question presented.

The evidence contained in the record is so voluminous as to make it impracticable to quote it, and we must con-

tent ourselves with a statement of its tenor and effect. It seems clear to us that it preponderates in favor of the contention of appellants to the extent of showing that there was such a misunderstanding on their part as resulted in their failure to purchase at the sale, though not to the extent of showing fraud or bad faith on the part of Mr. Lobingier. To our minds it fairly shows that the agreement with appellants was entered into substantially in the manner and form set forth in their motion; that in order to carry out such agreement the purchase and assignment were made of the decree of foreclosure in question; that Benewa was procured to make a deed of the premises, subject to the decree; that the sum of \$12.50 a month was collected from appellants, and, while the payments were somewhat irregular, they appear to have been made in full, or substantially so, until long after the sale of the premises complained of took place. Indeed, the payments were made up to within one month of the time of the application for a confirmation of the sale; that Ida M. Cronk, who claims as owner of the decree, purchased the same *pendente lite* from Mr. Lobingier. It seems clear from the affidavits of the appellants, of Mr. Ed P. Smith, and Mr. W. A. Spencer, that the appellants understood that no order of sale would be issued on the decree and that the premises would not be sold thereunder as long as the payments agreed upon were kept up. It also appears from other evidence contained in the record that it was agreed that, when the amount paid for the decree, with interest thereon, should be reduced to \$750, the premises would be conveyed to appellants, and a mortgage thereon taken back to secure the payment of that amount; that an assignment of the decree was made to Ida M. Cronk, and without notice, and immediately thereafter an order of sale was issued thereon, under which the sale in question herein took place; and it would seem that such proceedings had the effect to deprive appellants of further opportunity to comply with their contract and redeem their home from

the lien of the decree. The foregoing facts would seem to render it unjust and inequitable to confirm the sale in question, and there is thus presented to us the question of the power of the court to deny the confirmation and set aside the sale.

In ordinary cases, on a motion to confirm a sale of real estate under a decree of foreclosure, the court will consider only such matters as relate to the regularity of the sale, and this may be stated to be the general rule applicable to such cases. To this rule, however, there are exceptions, and it has often been held that, in an equitable proceeding of this nature, the court will refuse to confirm a sale where it was unfairly conducted; and there would seem to be no good reason why such power should not be exercised when it appears that through a misunderstanding between the parties one of them was prejudiced without fault on his part.

In 2 Jones, Mortgages (6th ed.), sec. 1639, we find the following: "The most general principle on which the courts act in setting aside the sale and ordering a new one is that equity will not allow any unfairness or fraud, either on the part of the purchaser, or of any other person connected with the sale."

In *Aderholt v. Henry*, 82 Ala. 541, the court said: "But, when there is some impropriety or irregularity attending the sale, affecting its fairness, or surprise or misapprehension caused by the conduct of the purchaser, or misconduct on his part, or on the part of any person connected therewith; or when the sale is conducted in violation of the decree, or in disregard of the rights and interest of some of the parties; or, when from any cause, it would be inequitable to permit it to stand, it becomes the duty of the court, on settled principles, to vacate the sale, though a conveyance may have been made, upon proper application, before confirmation, in the suit in which the sale was made."

In *Paulett v. Peabody*, 3 Neb. 196, it was held: "Judicial sales should be conducted with the utmost fair-

ness and good faith. Indeed the rules which govern them are not less stringent than in ordinary cases. If a sale is made under a decree of the court, and there is shown to have been false representations, or undue concealment, in the conditions or particulars of the sale, by any person interested therein, to the injury of another, the sale should be set aside, if application is made before the conveyance is executed." To the same effect are *Frasher v. Ingham*, 4 Neb. 531; *Aldrich v. Lewis*, 28 Neb. 502; *Goble v. O'Connor*, 43 Neb. 49, and *McKeighan v. Hopkins*, 19 Neb. 33.

From the foregoing authorities it seems clear that we have not only the power, but it is also our duty, to set aside the sale in question. The judgment of the trial court is therefore reversed, the sale is set aside and held for naught, and the cause is remanded to the district court, with directions to take an accounting of the amount due upon the decree in question, that the appellants be allowed sixty days within which to redeem the premises in question from the lien of such decree, and, in default of such payment within said time, the assignee be given leave to proceed to enforce her decree according to law.

JUDGMENT ACCORDINGLY.

ROYAL HIGHLANDERS, APPELLANT, V. STATE OF NEBRASKA
ET AL., APPELLEES.

FILED JUNE 20, 1906. No. 14,642.

1. **Taxation: EXEMPTIONS: BENEFICIAL ASSOCIATIONS.** A fraternal beneficiary association, conducted for the mutual benefit of its members and for the purpose of providing a fund by the payment of stated dues and fees from such members for the payment of a special amount upon the death of each member to a beneficiary named by him, is not a charitable association, and its property and funds are not used exclusively for charitable

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purposes so as to be exempt from taxation by the laws of this state.

2. **Statutes: CONSTRUCTION.** Where the legislature has passed an act providing for a new system of raising revenue, and has thereby changed the former methods of procedure relating to matters of taxation, the courts in construing its provisions are not bound by any administrative construction of the former revenue law.
3. **Taxation: CREDITS.** Under the rule established by the decisions of this court for the taxation of credits, a fraternal beneficiary association is entitled to set off the amount of its outstanding beneficiary certificates, matured and unmatured, against securities in its fidelity or mortuary fund, set apart and devoted exclusively to the payment of such certificates.

APPEAL from the district court for Hamilton county:
ARTHUR J. EVANS, JUDGE. *Reversed.*

Hainer & Smith, for appellant.

Norris Brown, Attorney General, *William T. Thompson*
and *M. F. Stanley*, *contra.*

Brome & Burnett, *amici curiæ.*

BARNES, J.

This case is before us on appeal from a judgment of the district court for Hamilton county affirming the order of the board of equalization of that county in the matter of the assessment of the property of appellant (Royal Highlanders, a domestic fraternal beneficiary association) for taxation for the year 1905. It appears that the association is duly organized under the laws of this state, and has its home office and principal place of business at Aurora, in Hamilton county; that in May, 1905, in response to the demand of the county assessor of said county, the association delivered to him a schedule of its property, from which it appears that it was the owner of certain lots in the city of Aurora, Hamilton county, Nebraska, and the building situated thereon, of the cost and value of \$21,238.56; that it had on hand furniture,

fixtures and office supplies of the value of \$1,200; that it had money in the banks of Aurora amounting to \$13,666.31; that it owned securities deposited as a credit with the auditor of public accounts of the state of Nebraska, amounting to \$455,900, which credit was its mortuary fund, deposited under the provisions of the statutes governing the affairs of such associations, the same having been collected and set apart for the payment of its debt due and to become due on the beneficiary certificates issued to and held by its members. All of said property was claimed by the association to be exempt from taxation, for the reason that it was used exclusively for charitable purposes. It was further claimed that the mortuary fund so deposited with the auditor of public accounts was not subject to taxation, because the association had the right to set off the amount of its obligations or debts due and to become due on said beneficiary certificates against said credit, which would leave it no net credit for taxation. Thereupon the assessor duly entered all of said property on the tax lists of said county for assessment. Thereafter the association appeared before the county board of equalization and filed its petition and protest, claiming said property, and all thereof, as exempt, for the reasons stated in its schedule. The board made an order sustaining the assessment as made by the assessor, and the association appealed to the district court for Hamilton county. To maintain its position in that court, the association filed its petition, setting forth more particularly and at large the matters contained in its protest, and prayed for a judgment declaring its property wholly exempt from taxation, and reversing the order of the county board. To this petition the attorney general and the county attorney of Hamilton county filed a general demurrer, which was sustained. The association excepted, elected to stand upon its said petition, offered evidence in support of all of the allegations thereof, which evidence was excluded, and thereupon the court rendered judgment against the association, affirming the order of the board of

equalization, and dismissing the appeal of the association at its costs.

It may be stated, in passing, that it clearly appears from the petition that the appellant is a fraternal beneficiary association, organized under the provisions of chapter 43 of the Compiled Statutes of this state, having a lodge system with ritualistic form of work, and a representative form of government; that it is formed, organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit; that, for and in consideration of certain stipulated payments in the form of fees and dues, it issues beneficiary certificates on the lives of its members, payable after their death to beneficiaries named therein, in manner and form as provided by its by-laws and the statutes of this state governing such associations; that it has its fidelity or mortuary fund, amounting to \$455,900, deposited with the auditor of public accounts, which fund is set apart and pledged by said association and by-laws for the payment of its beneficiary certificates due and to become due, and constitutes a trust fund for that purpose, and for no other; that of its credit balance at the banks, \$12,174.98 belongs to said fund, and the remainder thereof, amounting to \$491.34, represents a fund used for the purpose of paying the running expenses of the association. The foregoing is an abridged statement of the facts shown by the record, but is quite sufficient as a basis for this opinion.

1. Appellant's first contention is that its entire property is exempt from taxation because it is used exclusively for charitable purposes. This question must be determined, not by what the association professes to be, but by what it really is, and the nature of the business it conducts. The general trend of judicial opinion in this country is that organizations like the appellant are, in effect, mutual insurance companies. In *State v. Live Stock Ass'n*, 16 Neb. 549, it was held that an association which insured only the property of its members by a policy in the form of a certificate of membership, for a premium paid simply

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as an admission fee, and by assessing its members to pay for the losses sustained by such certificate-holders, was to all intents and purposes a mutual insurance company. Again, in *State v. Farmers Benevolent Ass'n*, 18 Neb. 276, the court, speaking of associations like the appellant, said:

"The courts have with a great degree of unanimity treated all such organizations as substantially life insurance companies, applying to them and to the mutual relations of the members the rules and principles applicable to the contract of life insurance."

The appellant classes itself as exclusively a charitable organization, but from an examination of its by-laws, called "Original Edicts," it appears that it is conducted for the sole benefit of its members and their beneficiaries. Its declared purposes are: "First. To unite for mutual benefit and fraternal protection all white persons of sound physical health and exemplary character between the ages of 18 and 65, and to bestow substantial benefits upon the beneficiaries of its membership admitted between the ages of 18 and 48 years who are entitled thereto. Second. To cheer and aid the unfortunate, to comfort and provide for the sick and aged, and to bury with becoming honor the dead of our membership. Third. To educate its members socially, morally, and intellectually, promulgating by ritualistic degrees the principles of prudence, fidelity and valor. Fourth. To establish and maintain funds for the purpose of paying all benefits provided for the members and their beneficiaries, and to defray the expense of management and promotion." All of these purposes are confined to its members, and are dependent upon the payment by them of the assessments required by the by-laws. Beneficiary members get what is paid for, and nothing more. If they cease to pay, they cease to receive. Members continue to pay for the benefit of another, not because of any charitable or benevolent impulse, but because they expect, upon their death, that those whom they are interested in, or bound by law or ties of affection to provide for,

will receive the amount which it is agreed in the beneficiary certificate will be paid by the association to such beneficiary. This is neither charity nor benevolence. Payment to the beneficiary does not depend upon his or her financial condition. A wealthy child or widow of the assured member would be entitled to claim the amount named in his certificate equally with one poor or needy. This benefit is paid because of so much money and so many assessments paid by the assured member. This benevolence or charity is purely of a commercial character; it does not seek out the needy, but invites only the able-bodied and healthy. It is a business arrangement; the beneficiary receives payment because of a contract obligation on the part of the association to make such payment. In *State v. Miller*, 66 Ia. 26, the court held that the Ancient Order of United Workmen, an association of practically the same character as the appellant, is a life insurance company, and that its fraternal character was simply an incident to its many purposes. In *Robinson v. Templar Lodge*, 117 Cal. 370, 59 Am. St. Rep. 193, the court said of an association similar in character and regulations to the appellant, concerning payments to be made to it:

"These benefits are not charities in the strict sense. They are dues, which the society becomes obliged to pay in certain events. It is a matter of right, and not of grace. A consideration is paid, and the lodge reserves no right to withhold payments when the conditions arise."

It seems clear therefore that the appellant is not what may be termed purely or exclusively a charitable organization. It further appears from an examination of its by-laws that its funds are divided into two classes, as follows: "The finance of the fraternity shall be divided into two funds: The fidelity fund and the general fund." The fidelity fund of the association is its mortuary fund, and is set apart for the payment of its beneficiary certificates due and to become due, while the general fund is used for organizing, maintaining and promoting the best interest,

growth and welfare of the fraternity, in other words, for the payment of the expenses of carrying on its business. So we are of opinion that the property of the appellant is not exempt from taxation by reason of its being used exclusively for charitable purposes.

2. It is further contended that we are bound by the administrative construction of our former revenue law. It is said, in substance, that our constitution was adopted in 1875; that the legislature of 1879, acting under the provisions of said instrument relating to taxation, framed a general revenue law, and exempted from taxation all property used exclusively for charitable purposes; that said revenue law has been so construed that no one has ever thought of taxing the funds of a fraternal beneficiary society until the year 1904; that the present revenue act is, in substance, the same as the former one; that the courts are bound by such administrative construction, and should not now hold the property of such associations subject to taxation. The doctrine of estoppel by construction is well established, and the argument of counsel based thereon comes with much force. Indeed, it might be held conclusive, were it not for the fact that in the year 1903 the legislature, by the adoption of the new revenue law, established more effectual methods than those which theretofore obtained in regard to matters of taxation. It is a fact, within the common knowledge of all, and one of which we may take judicial notice, that formerly so much property escaped taxation as to render the revenue of the state insufficient to pay the expenses incurred in conducting its ordinary business affairs, and we were confronted with a continually increasing state debt. This created a universal demand throughout the state for a new revenue law. In answer to this demand the legislature at its session of 1903 adopted our present system. While so much of the present act as designates what property shall be taxed, and what shall be exempt from taxation, is practically the same as those provisions contained in the former revenue law, yet the new act

contains such minute directions for listing, valuing and assessing property for taxation as to render it extremely difficult for any person or corporation to avoid the payment of taxes upon all of his or its property, and the adoption of the new law has resulted in the taxation of the property of appellant and other like associations. The power of the state to make such changes from time to time in its revenue laws, and adopt such new methods in regard to matters of taxation as may be found necessary to raise an amount of revenue sufficient for its needs, cannot be questioned. The legislature having exercised such power, neither taxing officers of the state nor the courts are bound by construction of the former law.

It is further urged that it was the intention of the legislature in passing the present law to completely exempt fraternal beneficiary associations from taxation, and our attention is called to the provisions of the act relating to the taxation of what are called old line insurance companies. It is insisted that, when the legislature provided for taxing such old line insurance companies upon their gross premiums for the preceding year, and exempted fraternal beneficiary associations and other like societies from that provision, the intention was not to tax such associations at all. It seems to us, however, that excepting such associations from those special provisions constitutes no evidence of an intention not to tax them, but, on the other hand, it shows an intention to tax them the same as all persons, corporations and other domestic associations are taxed. If the legislature had intended to exempt them from taxation, it certainly would have expressed such intention and thus put the question beyond all doubt. So we are of the opinion that the property of mutual benefit associations organized under the laws of this state is taxable the same as the property of individuals, corporations and other domestic associations.

3. Finally it is contended by the appellant that it is entitled to set off the amount of its outstanding beneficiary certificates, matured and unmatured, against its fidelity

or mortuary fund. This is the only remaining question for our determination. It is the settled law of this state that the word "credits," as used in our present revenue law, means "net credits"; that "the taxpayer may deduct from his gross credits the amount of his *bona fide* debts in order to determine the true value of his credits for assessment." *State v. Fleming*, 70 Neb. 523; *Lancaster County v. McDonald*, 73 Neb. 453. The state insists that this fund is money loaned and invested, and therefore must be taxed. Money loaned or invested within the ordinary meaning of the term is money or capital laid out with a view of obtaining a profit or income therefrom. The fact that the fund in question has assumed the form of bonds, mortgages and other securities does not of itself fix its nature or determine its use. It is the use to which it is put that determines its character. That this fund is not loaned or invested for profit, within the ordinary meaning of the term, seems clear. As above stated, the fidelity or mortuary fund of the association is set apart by its by-laws and the laws of this state as a trust fund for the payment of its beneficiary certificates. This fund must be kept and conserved for that particular purpose. The statute provides how it shall be invested for its preservation, and the manner in which it may be withdrawn from time to time for the purpose of paying the beneficiary certificates of the association as they become due. It is a credit which was created for that particular purpose, and no other. A like question was before the supreme court of Alabama in *Alabama Gold Life Ins. Co. v. Lott*, 54 Ala. 499, where it was held that a life insurance company, when its solvent credits are assessed for taxation, is entitled to have deducted therefrom its premium reserve. The same question was before the supreme court of Iowa in *Equitable Life Ins. Co. v. Board of Equalization of City of Des Moines*, 74 Ia. 178. The court said:

"It is plain that the legislature enacted this statute to secure to the policy-holders the performance of the obligation to pay the amount secured by the policy. This

statute, therefore, recognizes the existence of a debt from the company to the policy-holders, and provides for securing its payment through this reserved fund. To us it seems plain that the plaintiff is indebted to each of its policy-holders, and the aggregate amount of such indebtedness equals this reserved fund, which should be deducted from plaintiff's money and credits in listing the same for taxation."

In *Michigan Mutual Life Ins. Co. v. Common Council of Detroit*, 133 Mich. 408, the question of the right of a mutual life insurance company (organized for profit), under a statute practically like our own, to set off its reserve fund credits against its mortuary debts for the purpose of taxation was before the court, and it was held that it had the right to deduct the amount of its policies from its premium reserve; that the reserve fund of the company represents its indebtedness to its policy-holders, and should be exempt from taxation.

It is contended by the state, however, that the foregoing decisions furnish no authority for the determination of the question involved in the instant case; that they apply only to old line life insurance companies, and the reason given for such contention is that the policies of old line companies have a present surrender value, while the beneficiary certificates of fraternal associations have no such value. It seems to us that this is a distinction without a difference. It is difficult to understand why old line insurance companies, which are organized for the purpose of gain and profit, should be accorded the privilege of the set-off, and that right denied to beneficiary associations, which are organized solely for the purpose of conserving the interests of their members and are prohibited by law from being conducted for the purpose of gain. It seems clear to us therefore that the beneficiary certificates issued to the members of the appellant association create a debt against it, for the payment of which the fund or, in other words, the credit in question is specifically pledged. So we are of opinion that the certificates create a *bona fide*

debt, payable out of the particular credit or fund known as the fidelity or mortuary fund of the association, and may, for the purpose of taxation, be set off against credits or securities in such fund. We are also of opinion that all of the property of the association which has not been segregated, set aside, transferred to, and become a part of the securities in its mortuary fund is taxable under the provisions of our present revenue law. It follows that the trial court erred in sustaining the demurrer to the appellant's petition, and in rendering judgment affirming the order of the board of equalization.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

SEDGWICK, C. J., dissents.

LETTON, J., concurring specially.

I concur in the view expressed in the opinion of Mr. Justice BARNES as to fraternal beneficiary associations, such as the Royal Highlanders, not being charitable associations and entitled to exemption from taxation for that reason. I also agree that this court is not bound by any administrative construction of the former revenue law for the reasons set forth in his opinion. With the conclusion reached I also concur, but, since I do so mainly upon grounds not mentioned in his opinion, I deem it proper to briefly state my views.

The question whether or not the securities held in pledge by the Royal Highlanders, or other domestic fraternal beneficiary associations, or whether the reserve held by domestic old line life insurance companies, are taxable as the property of the respective associations or corporations, is purely one of statutory construction. The controlling question for the court to determine is, what was the intention of the legislature with respect to the subject matter? To ascertain this intention is the sole duty of the court in

the premises, and, when this is determined, the construction must stand until such time as the legislature may determine that the court has incorrectly interpreted the meaning of its language, and enacts a new provision so clear and specific that all may understand. To ascertain the intention of the lawmaker, we must consider the whole statute, its purpose and object, and the means provided in the act for attaining the desired end. Uniformity in taxation is essential under our constitution, and it must be presumed that the legislature intended, as nearly as possible, taking into consideration the innumerable phases, conditions, and forms in which property appears, to secure uniformity. In accomplishing this result, it is proper to classify property, individuals or corporations, and by sections 58, 59, 60 and 61 of the law under consideration this classification has been made so far as concerns insurance companies. These sections have been the subject of consideration in *State v. Fleming*, 70 Neb. 523, and in *Aachen & Munich Fire Ins. Co. v. City of Omaha*, 72 Neb. 518, and they were upheld as a proper exercise of the taxing power in that behalf. By section 59 all *foreign* life and accident insurance companies, except fraternal beneficiary associations and mutual assessment companies, were placed in one class, and by section 61 all *domestic* life, fire, accident, or surety companies, except fraternal beneficiary associations and mutual assessment companies, were placed in another class. By the provisions of section 59 each foreign company is required to pay into the state treasury 2 per cent. of the gross amount of premiums received by it during the preceding calendar year for business done in this state. This is a business tax imposed under the second clause of section 1, art. IX of the constitution, and such companies are also liable for taxation upon all their property within the state the same as other corporations or individuals, *State v. Fleming, supra*, and *Aachen & Munich Fire Ins. Co. v. City of Omaha, supra*. Section 61 provides that all domestic companies shall be taxed in each local political subdivision where the agent conducts the busi-

ness, upon their gross premium receipts for the preceding year, less premiums on canceled policies and reinsurance, such gross receipts less reinsurance and cancellation to be taken as an item of property of that value, and be assessed and taxed on the same percentage of such value as other property. This tax also is a business tax, and each of such domestic companies is liable also to be taxed upon its tangible property the same as any other individual or corporation within the state.

No specific provisions are made for taxation of fraternal beneficiary associations, or mutual assessment companies, having no capital stock, making no dividends, and whose scheme of insurance does not contemplate the return of any profits to policy-holders. The tangible property of such associations and mutual companies, whether domestic or foreign, is to be taxed, therefore, the same as the property of other persons and corporations. It is made compulsory upon domestic corporations carrying on the business of life insurance under the old line plan to accumulate and keep on hand a fund for the purpose of meeting their outstanding obligations to policy-holders, and, although not compulsory in the case of domestic fraternal beneficiary associations or mutual assessment companies, it is a matter of common knowledge that a number of such associations or companies, including the Royal Highlanders, voluntarily have accumulated a fund, variously designated as a mortuary, reserve, or emergency fund, for the purpose of meeting liabilities to their certificate-holders as they mature, in order to prevent such frequent assessments as experience has shown may be caused by epidemics of disease or widespread calamities. Whether held by old line companies or associations formed upon the assessment plan, these funds are set apart to meet obligations of a certain nature. They are not the property of the company or association for general purposes, but are devoted to a specific end. In the case of foreign life insurance companies, these accumulations are held in other states or countries and are not within the reach of the taxing officers of this state. In this

state such companies, therefore, merely pay 2 per cent. upon the gross amount of premiums received during the preceding year, into the state treasury as a business tax, and are otherwise assessed only upon their tangible property within this state, which may or may not exist, since its existence is not essential to carrying on business. They are relieved from all local taxation, except upon tangible property, unless taxed by local ordinances upon their business. Domestic companies, however, are taxable in each county, town, city, village, and school district, where an agent conducts their business, upon their gross receipts, less reinsurance and return premiums, on the same percentage of value as other property, and in addition thereto are taxed upon their tangible property.

It will be seen, from a comparison of these provisions with reference to the taxation of foreign and domestic life insurance companies, that if the law is construed so that the special reserve or mortuary funds of domestic companies and of domestic fraternal beneficiary associations, accumulated, reserved, and set apart to meet their liability to their policy and certificate-holders, are to be taxed as the property of such companies and associations, a heavy burden is placed upon domestic organizations from which foreign are exempt. The business tax which domestic companies are required to pay may be as great as, or greater than, that exacted from foreign companies, depending upon local conditions. It is not to be presumed that the legislature intended to impose a heavy burden upon domestic enterprises of this character from which those organized in other states are free. It would be doing violence to common sense to believe that its intention was to make a hostile discrimination against citizens of this state in favor of citizens of other states. It may be said that foreign companies are taxed in the states or countries of their domicile upon such funds, but, as is pointed out in the opinion of my brother BARNES, in several states where net credits are the subject of taxation the amount of liabilities to policy-holders has been held entitled to be properly

offset against gross credits in the form of such securities. It may further be said that the methods of taxation of insurance corporations in other states are so various and diverse that it is almost impossible to say whether or not such accumulations are subject to any portion of the taxes paid by such companies. Many of the states provide for the taxing of insurance corporations, not by the value of their tangible property, but by franchise, business, or license taxes alone, and so far as I can determine from an examination of the statutes, in the main such funds, if taxed at all, are not taxed directly, as is sought to be done in this case. While, in the case of ordinary business, and if considered without relation to the sections of the revenue law relating to the subject of insurance taxation, it may be questioned whether contingent liabilities are such debts as would be entitled to be offset against credits, yet, considering the subject of insurance taxation as a whole, the conclusion reached by my brother BARNES seems to me to express the legislative intent.

With respect to the taxation of insurance companies and fraternal beneficiary associations, as well as in many other respects, the provisions of the revenue law of 1903 are far from clear and definite, and may be expected to give rise to many controversies. If the construction now placed upon the law fails to evidence the purpose of the lawmakers, the remedy lies with the legislature. The resources of the English language are vast and rich and flexible enough so that it may express its intention in phrase so clear and plain that an ordinary man may understand, and thus relieve the court from liability to a misconstruction of its meaning, and the taxpayers of the state from unnecessary litigation.

STATE OF NEBRASKA V. JOHN F. DECKER.

FILED JUNE 20, 1906. No. 14,316.

Habeas Corpus: REVIEW. The procedure to obtain a review in this court of a final order made by a district court or judge in a proceeding in habeas corpus must be such as is required to be followed for a like purpose in civil actions. Sections 483 and 515 of the criminal code are not applicable thereto.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Dismissed.*

James L. Caldwell, F. M. Tyrrell and Charles E. Matson,
for plaintiff in error.

Charles O. Whedon, contra.

AMES, C.

One John F. Decker had been arrested and was detained by the sheriff of Lancaster county, and in the common jail of that county, upon a warrant issued by a justice of the peace, and charging him with having committed the offense of perjury while testifying as a witness upon the trial of a civil action in the district court for that county. Decker applied to the district court for, and obtained, a writ of habeas corpus under which to have inquiry made into the legality of his detention. The sheriff to whom the writ was directed made due return thereto, producing the person of the petitioner as therein commanded, and the court, after a hearing involving the taking of 166 pages of typewritten testimony, decided that there was no reasonable or probable cause for the accusation made in the warrant, and on the 23d day of February, 1905, ordered that the prisoner be discharged from custody. The county attorney, who was present at the hearing, took exceptions to certain orders and rulings of the court during the progress thereof, and afterwards caused a bill of exceptions of the same to be made up and settled by the district judge

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in the manner prescribed by section 483 of the criminal code. On June 8, 1905, before the late act regulating appeals to this court had taken effect, the county attorney caused said bill of exceptions, together with a transcript of the proceedings in connection with which it was prepared, to be filed with the clerk of this court, as well as a petition in error in which it is recited that the county attorney and deputy county attorney "proceed under the provisions of section 515 of the criminal code," and in which they assign certain errors as having been committed by the court during the progress of the hearing, and complain that the court was without jurisdiction to make or render an order of discharge of the prisoner. But the document, which is signed by the county attorney alone, and in his official character only, does not expressly pray the judgment of the court upon its assignments or for a recaption of the accused.

It was decided by this court in *In re Van Sciever*, 42 Neb. 772, that a final order by a district court, or judge, made in a proceeding in habeas corpus, was reviewable in this court by proceedings in error, but that such a proceeding is a civil action and the procedure applicable to obtaining a review in this court is that provided by the code. It follows that the suit in this court must be prosecuted by or on behalf of some one having an interest in the controversy, that is, the petitioner, or some person or persons claiming a right to his custody, and that a bill of exceptions, if one is required, must be made and settled in the manner provided by statute for the making of such documents in civil actions. Sections 483 and 515 of the criminal code, to which alone the procedure in this case was attempted to be made conformable, are not applicable to such actions as the present, and this court is therefore without jurisdiction.

It is recommended that the petition in error be dismissed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the petition in error be

DISMISSED.

THOMAS C. JOHNSON, APPELLEE, v. A. H. HIGGINS,
APPELLANT.

FILED JUNE 20, 1906. No. 14,400.

1. **Specific Performance: DEFAULT.** Neither party to an executory contract for the purchase and sale of lands can put the other party in default without a readiness and offer to perform on his own part, but for the purposes of an action for a specific performance a formal, technical tender is not indispensable, and an express repudiation of the contract and refusal to perform it by one party excuses the other from any subsequent formal offer or tender.
2. ———: **TENDER.** It is not indispensable in an action for the specific performance of an executory contract for the purchase and sale of lands that the plaintiff should have been capable of performance at the date the contract was entered into, if he was able, ready and willing and offered to perform at the time and in the manner stipulated in the agreement.
3. **Vendor and Purchaser: CONTRACT.** An executory contract for the sale of a body of lands which includes the family homestead of the vendor and which is not signed and acknowledged by his wife is not wholly void, but is obligatory upon him, except with respect to the homestead tract, and such a contract is therefore not open to the objection of want of mutuality.

APPEAL from the district court for Cedar county: GUY
T. GRAVES, JUDGE. *Affirmed.*

J. C. Robinson and C. H. Whitney, for appellant.

W. D. Funk and A. A. Welch, contra.

AMES, C.

There is no substantial dispute about the facts in this case. Johnson, the appellee, was the owner in fee of 387

acres, including his family homestead, of lands situated in Cedar county in this state and was also the owner of leases from the state of 520 acres of adjoining school lands, but he was indebted to one Abbott, who held as security an assignment of the leases and also a mortgage on the lands owned in fee. There was, besides, a small judgment against Johnson which would have been a lien upon his lands except for its dormancy. This state of facts was known to A. M. Merrill and the appellant, Higgins, who in May, 1902, entered jointly into a written contract with Johnson for the purchase of the land and leases for an agreed price of \$15,000, of which \$500 was paid in cash and the residue was agreed to be paid on March 1, 1903, upon conveyance and assignment to them of an unincumbered title to the land and leases. Mrs. Johnson, the wife of the appellee, did not sign the contract. The first day of March fell on Sunday, but on the third day of the month Johnson, having provided himself with a deed properly executed and acknowledged by himself and wife and purporting and competent to convey the title to the lands in fee to his vendees, sought out the latter for the purpose of consummating the sale pursuant to the contract. At and before that time there had been some conversation relative to an extension of the time of payment of the mortgage debt upon the existing security and the deduction of the amount thereof from the purchase price, upon an assumption of it by the purchasers, but no definite or final agreement to that effect had been made, and an abstract with which Johnson had armed himself showed the continued existence of the mortgage, and the leases and the assignments of the latter were still in the possession of Abbott, who, it was at first contemplated by the parties, should be satisfied for the indebtedness to him, out of the purchase price, simultaneously with the making of the conveyances contemplated by the contract of sale, and who was at the same instant to assign the leases and execute a release and discharge of the mortgage. This arrangement was known and satisfactory to Abbott,

who was willing and ready to comply with it. On the 3d of March Higgins told Johnson that Merrill was away from home, but that on his return on the following day they would inform him, Johnson, what they desired or intended to do. On the next day Johnson informed both his vendees that he was able, ready and willing to complete the transaction, including the payment and satisfaction of the dormant judgment, and the procurement of the presence of Abbott and his discharge of the mortgage and assignment of the leases, and the delivery of the above mentioned deed executed and acknowledged by himself and wife, upon the payment by them of the residue of the purchase price, or he would comply with any arrangement they should be able to make with Abbott for the extension of the mortgage debt and its deduction from the purchase price. Both these offers the vendees declined, and they then informed the vendor that they had finally decided not to carry out the contract of purchase. Eight days later, on the 12th of the month, this action was begun by Johnson to obtain a specific performance of the contract, which he was at the time of the trial and had been at all times able, willing and ready to perform on his own part. Merrill had departed from the state and was not served with process, but judgment as prayed was rendered against Higgins, who prosecutes this appeal.

Time was not of the essence of the contract. A formal tender of the deed and of assignments of the contracts was not incumbent upon the plaintiff, at least until his vendees had signified a readiness and willingness to perform the contract on their part. The delivery of these instruments and the payment of the purchase price were required by the contract to be simultaneous acts. Neither party could have put the other in default without having first offered performance on his own part, but an offer made in good faith and with ability to perform, if declined by the opposite party, excused a formal tender. *Frenzer v. Dufrene*, 58 Neb. 432; *Harrington v. Birdsall*, 38 Neb. 176; *Wasson v. Palmer*, 17 Neb. 330; *Kellogg v. Lavender*,

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9 Neb. 418. When the vendees notified Johnson that they repudiated the contract and would not comply with its obligations, they excused him from making any subsequent formal offer or tender. The law does not require the doing of a vain thing.

Counsel for defendant contends that the contract containing a stipulation for a conveyance of the vendor's homestead as well as other lands, and not having been signed and acknowledged by the wife, was void as to the homestead, and therefore lacked that degree of mutuality requisite for the maintenance of this action. In other words, it is urged that, unless the right and obligation of specific performance are existent and reciprocal at the date a contract is entered into, they can never come into being at all, and authorities of undoubted weight and respectability are cited in support of this proposition; but decisions equal in number, and of at least equal weight, might be cited to the contrary, and these latter have, moreover, received the approval of and been adopted by this court. In *Bigler v. Baker*, 40 Neb. 325, this court, in an opinion by Mr. Justice Post, after discussing the question at some length and citing many decisions, say: "But the true rule is believed to be that want of mutuality in such cases is not a valid objection, even to decree of specific performance, where the moving party has performed all of the conditions imposed upon him, and brought himself clearly within the terms of the agreement." This decision was cited and expressly reaffirmed in the recent case of *Watkins v. Youll*, 70 Neb. 81, and ought not to be longer questioned. But the lack of mutuality supposed by counsel has never existed in the contract in suit. The absence of the signature and acknowledgment of the wife did not avoid the entire instrument, but affected it, so far as the rights of the vendees were concerned, simply as would have done an omission of a description of the homestead from the covenant to convey. With this exception their right to demand specific performance or to recover damages for a breach of the contract was precisely the same

as in any other case. This is the point essentially involved and decided by this court in the recent case of *Lichty v. Beale*, 75 Neb. 770. They are not in a position to complain because the plaintiff, before he could demand specific performance, was compelled to offer more than, under the contract, they could have required of him. No fraud is charged or was practiced. At the time the vendees entered into the contract, they were not ignorant of the facts and are presumed to have known the law. They knew, therefore, to what extent the agreement was reciprocally obligatory, and upon what terms and conditions specific performance could be successfully demanded of them, and no reason has been suggested why they should be released from their covenants.

Other propositions urged by the defendant are involved in the foregoing and therefore do not require separate treatment. The decree requires that the defendant accept the conveyance and assignments stipulated for in the contract and pay to the plaintiff, or into court for his use, the unpaid residue of the purchase price, with interest and costs, and that in default of such payment execution issue therefor. Of course, upon the instant that such payment shall be made or compelled, the title to the land and leases will vest in him and the identical transaction contemplated by the contract will have been consummated.

It is recommended that the judgment be affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

ASMUS WIESE, APPELLEE, V. UNION PACIFIC RAILROAD
COMPANY ET AL., APPELLANTS.*

FILED JUNE 20, 1906. No. 14,232.

1. **Adverse Possession: MERGER.** The party in possession of land as owner has a right to protect that possession by the purchase of any outstanding claim or lien against the property. There is not thereby any break in possession, nor does the adverse occupant rely upon his purchase title in preference to the one which he previously possessed. He joins the two together and possesses whatever title both may give him. *Oldig v. Fish*, 53 Neb. 156, followed and approved.
2. **Public Lands: RAILROAD GRANTS: PATENTS.** The act of congress of July 1, 1862, 12 U. S. Statutes at Large, p. 489, ch. 120, and July 2, 1864, 13 U. S. Statutes at Large, p. 356, ch. 216, granting land to the Union Pacific Railroad Company and to the Sioux City & Pacific Railroad Company, transfers a present legal title, when the terms of the grant are complied with and the lands are identified by a map of definite description filed in the general land office. A patent to such land, when finally issued, relates back to the date of the grant.
3. **Adverse Possession.** When one tenant in common conveys the whole estate in fee with covenants of seizin and warranty, and his grantee enters and holds exclusive possession, the entry and holding must be deemed adverse to the title and possession of the cotenant.
4. **Public Lands: LIMITATIONS.** The title of the United States government is fully divested by a grant *in presenti* of all lands within the place limits of the grant and not within the exceptions therto; and subsequent proceedings affecting the patent to such lands in the interior department do not not suspend the running of the statute of limitations in favor of one claiming under the grant.

APPEAL from the district court for Washington county:
EDMUND M. BARTLETT, JUDGE. *Affirmed.*

William G. Clark and Charles A. Clark & Son, for appellants.

James H. Van Dusen, contra.

* Pending on error in the supreme court of the United States.

OLDHAM, C.

This is an action to quiet title to certain land situated in Washington county, Nebraska, which was included within the land grants made by the United States government to the Union Pacific Railroad Company and the Sioux City & Pacific Railroad Company by acts of congress of July 1, 1862, 12 U. S. Statutes at Large p. 489, ch. 120, and July 2, 1864, 13 U. S. Statutes at Large, p. 356, ch. 216. The land lies within 20 miles of the right of way of the Union Pacific Railroad, and within 10 miles of the right of way of the Sioux City & Pacific Railroad. It is admitted that each of the two railroad companies had fully complied with the provisions of the acts of congress prior to January 1, 1870. No patent for the land was issued until September 23, 1897, when a patent was issued at first by mistake to the Missouri Valley Land Company, as successor to the Sioux City & Pacific Railroad Company, but this patent was canceled by order of the land department and returned to the government, and a patent was issued jointly to the Union Pacific Railroad Company and the Missouri Valley Land Company, as successor to the Sioux City and Pacific Railroad Company. After full compliance with the terms of the grant, the Union Pacific Railroad Company filed its map of definite location and listed the land in controversy as its own. In 1882 it entered into a contract of sale of the land in controversy with one John Japp, for \$10 an acre. On the completion of the payments on this contract, it executed to him a warranty deed for this land. The deed was recorded in Washington county in 1888. After the purchase of the land, Japp went into possession thereof and began farming and cultivating the land continuously from the time of his purchase up to 1891, when he conveyed the land for a consideration of \$1,200 by a warranty deed to plaintiff Wiese, who placed the deed on record and entered into possession of the premises, which he has occupied, fenced and improved and continuously cultivated to the present

time. Plaintiff claims the land by adverse possession and this color of title. Defendant, Iowa Railroad Land Company, claims an undivided interest in the land by mesne conveyances from the Sioux City & Pacific Railroad Company. At the trial in the court below the title was quieted in the plaintiff, and to reverse this judgment defendants have appealed to this court.

There is little or no conflict in the testimony contained in the bill of exceptions, the controversy being as to questions of law, rather than those of fact. It clearly appears that on the completion of the terms of the grant the Union Pacific Railroad Company made its map of definite location and filed the same in the general land office, and that it listed the land in controversy and conveyed it as land which it had received under the grant. The land was not listed by the Sioux City & Pacific Railroad Company until after the conveyances to plaintiff and his grantor. It appears from the record that the land in controversy had been claimed as indemnity school land by the state of Nebraska, but that this claim had been canceled and denied by the land department before the conveyance by the Union Pacific Railroad Company to plaintiff's grantor, so that, as far as the record discloses, there was no contest pending in the land department affecting the validity of the grant to either of the railroad companies when the land was conveyed to plaintiff's grantor.

On September 16, 1894, plaintiff Wiese undertook to make a cash entry of the land in controversy at the receiver's office of the United States land office at O'Neill, Nebraska, under the act of congress of March 3, 1887, entitled "An act to provide for the adjustment of land grants made by congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes." 24 U. S. Statutes at Large, p. 556, ch. 376. The right to a cash entry of this land as a forfeited grant was contested before the land department by the Sioux City & Pacific Railroad Company. While the entry was allowed at the land office in the first instance, the

commissioner of the general land office at Washington canceled the entry on the 23d day of August, 1896, and directed the United States land office at O'Neill to note such cancelation on its records.

It is claimed by defendants that this application for a cash entry at the land office at O'Neill was a recognition of the outstanding title in the United States government, which tolled the statute of limitations. In support of this proposition we are cited, as a controlling case among others, to the opinion of this court in *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371. In this case it was held that the recognition of the title of the record owner of the land by the railroad company in seeking to condemn the land was such a recognition as would arrest the statute of limitations, even if it had commenced to run. Here the recognition was of the title of the record owner of the premises. In the case at bar, the attempt on the part of Wiese to procure the outstanding patent from the United States was in no sense a recognition of the title of the Sioux City & Pacific Railroad Company. At the time the application for the cash entry was made, Wiese and his grantor had been in possession of the land, claiming it as their own, for the full statutory period of limitation. Even if the application had been made before the full period of occupancy had run, so far as the rule in this state is concerned, such effort to procure an outstanding title would not have impaired the right to rely upon the statute. In *Oldig v. Fiske*, 53 Neb. 156, which reviews our former decisions, it is said: "A party in possession of land as owner certainly has a right to protect that possession by the purchase of any outstanding claim or lien against the property. There is not thereby any break in the possession, nor does the adverse occupant rely upon his purchased title in preference to the one which he previously possessed. He joins the two together and possesses whatever title both may give him."

The contest between the two railroad companies concerning these overlapping land grants appears to have

been instituted after the conveyance of the land in controversy by the Union Pacific Railroad Company. This contest was finally determined in *Sioux City & P. R. Co. v. Union P. R. Co.*, 4 Dill. (U. S.) 307, by holding both companies as tenants in common of the overlapping grants. It was under this view of the conflicting rights of the two companies that a joint patent to the land was subsequently issued to the two companies by the direction of the secretary of the interior.

It is further contended by counsel for the defendants that the title to the land in controversy remained in the government until the issuance of the patent in 1897, and, on the contrary, it is contended by counsel for the plaintiff that, on the compliance with the terms of the grant by the different railroad companies and the filing of the map of definite description in the general land office, the title of the general government was divested and the railroad companies took the lands by grants *in presenti*. The question of interpretation of grants by this act was before the supreme court of the United States in the case of *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, and it was there held, in an exhaustive opinion by Field, J., that the act of July 1, 1862, 12 U. S. Statutes at Large, p. 489, ch. 120, granting lands to the Union Pacific Railroad Company, transfers a present legal title, and when the lands are identified by the location of the road, such title attaches as of the date of the grant. In this case it was held that the lessee of the railroad company might maintain ejectment for lands within the grant, although the patent had not yet issued from the general government. In the opinion it is said:

"In the legislation of congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justifies its recognition

and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government."

In *French v. Fyan*, 93 U. S. 169, it is said by Miller, J.: "The patent, therefore, which is the evidence that the lands contained in it had been identified as swamp-lands, under that act, relates back and gives certainty to the title of the date of the grant."

Now, applying the principle announced in these cases to the facts in issue, we must conclude that, on the full compliance with the terms of the grant and the identification of the lands by the map of definite description filed in the land department, the title to the lands passed as of the date of the grant to the railroad companies, and the patent subsequently issued but evidences such fact.

It is further urged, however, by counsel for the defendants that, even if the patent when finally issued by the general government should be construed to relate back to the time of the grant as between the two contending railroad companies, it is inequitable and unjust to permit the relation for the purpose of supporting plaintiff's claim to title by adverse possession. And in support of this contention we are cited to the case of *Gibson v. Chouteau*, 13 Wall. (U. S.) 92. This was a case in which the right of one claiming adversely to the grant and patent, which had been long contested in the land department of the United States, was held not entitled to have the final award of the patent dated back to the time of the grant for the purpose of aiding his claim to a title by adverse possession. In reversing a contrary holding by the supreme court of Missouri, it was said by the same learned judge who delivered the subsequent opinion in *Deseret Salt Co. v. Tarpéy*, *supra*:

"The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of per-

sons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title. The defendants in this case were strangers to that party and to his equitable claim, or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder."

In the case at bar, each of the contending parties relies on the same grant of the land in controversy, that is, the congressional grant of 1862 and 1864. The land is within the place limits of this grant to the grantors of each of the contending parties. When, as pointed out before, there appears to have been no contest over the acquisition of this land by the congressional grant, the Union Pacific Railroad Company listed the land as its own, and conveyed the same for a valuable consideration to plaintiff's immediate grantor by a deed purporting to convey the entire interest in the land. It is a proposition well recognized by the weight of authority, as well as by the courts of this state, that, when one tenant in common conveys the whole estate in fee with covenants of seizin and warranty and his grantee enters and claims and holds exclusive possession, the entry and holding must be deemed adverse to the title and possession of the cotenant and amount to a dis-seizin. *Kittredge v. Proprietors of Locks & Canals on Merrimack River*, 34 Mass. 246; *Hanson v. Ingwaldson*, 77 Minn. 533, 80 N. W. 702; *McCann v. Welch*, 106 Wis. 142, 81 N. W. 996; *Beall v. McMenemy*, 63 Neb. 70. Now, at least at the time that the deed from the Union Pacific Railroad Company, purporting to convey the entire estate in this land, was placed on record, defendants' grantor was served with notice of the adverse claim to the entire land by its cotenant, but, so far as the record discloses, the first time that defendants' grantor asserted any claim to the land of any nature, other than its compliance with the terms of the grant, was in the year 1894, when it contested plaintiff's right to a cash entry. In this contest, defendants' grantor contended that the land was within

the terms of the grant and that it had not been forfeited, nor had it ever been conveyed by contestant to the plaintiff. When the contest over this certificate had been terminated by the cancelation of the plaintiff's application, by order of the commissioner of the land office in 1896, no further effort was made by defendants' grantor to evict plaintiff from the possession of the land, or to assert its right therein as a cotenant, until the filing of its answer in the instant suit on the 5th day of October, 1903.

In view of these facts, we think that the doctrine of relation is taken out of the reason of the rule announced in *Gibson v. Choutcau*, *supra*: First, because there was a privity of interest between the original grantors of the contending parties, each claiming under the terms of the same grant, and, second, because defendants' grantor, by neglecting to list the land in the overlapping grant, permitted plaintiff's grantor, the Union Pacific Railroad Company, to sell and dispose of the land for a valuable consideration to John Japp, and permitted Japp to convey the land for a valuable consideration to plaintiff. This laches in the assertion of its cotenancy in the land in controversy by defendants' grantor, in addition to the intervening rights that plaintiff has acquired in reliance on the title of his grantors, make it, in our view, both just and equitable that the patent issued later should relate back to the date of the grant for the purpose of quieting plaintiff's title. Defendants seek to excuse the laches of their grantor in asserting its claim to the land, by alleging that, up to the time of the final issuance of the patent, the land in controversy was within the exclusive jurisdiction of the land department of the United States. If the grant were one which the department of the interior had paramount authority to determine, this contention would be well founded; but, as the grant in question was one *in presenti* and as the land in controversy was within the place limits, and not within the exceptions of the grant, the title of the general government was fully divested by this grant, and any subsequent proceedings in the interior

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department should not and would not toll the statute of limitations. *Sage v. Rudnick*, 91 Minn. 330, 100 N. W. 106; *Southern P. R. Co. v. Whitaker*, 109 Cal. 268.

We therefore recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CARSTEN WRICH, APPELLEE, V. UNION PACIFIC RAILROAD
COMPANY ET AL., APPELLANTS.*

FILED JUNE 20, 1906. No. 14,233.

Wiese v. Union P. R. Co., ante, p. 40, followed and held to control the issues in this case.

APPEAL from the district court for Washington county:
EDMUND M. BARTLETT, JUDGE. *Affirmed.*

William G. Clark and Charles A. Clark & Son, for appellants.

James H. Van Dusen, contra.

OLDHAM, C.

This is a companion case to *Wiese v. Union P. R. Co.*, ante, p. 40, and the two cases were presented together in the oral argument. The two cases were tried together in the district court, and a judgment quieting the title in the plaintiff was rendered in each of them. The facts, so far as they affect the conclusion to be reached, are practically the same. In this case the plaintiff, Carsten Wrich, purchased the land by contract from the Union Pacific Rail-

*Pending on error in the supreme court of the United States.

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road Company in 1881, and received his deed in 1890. He took possession immediately after his purchase and has claimed the land as his own ever since. In September, 1893, plaintiff Wrich undertook to make a cash entry of the land in the same manner as his neighbor Wiese did, so that every question involved in the controversy is fully covered in the opinion in *Wiese v. Union P. R. Co.*, *supra*.

For the reasons given in that opinion, we recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

EDMUND JOHNSON, APPELLANT, V. JUDSON CARPENTER,
APPELLEE.

FILED JUNE 20, 1906. No. 14,363.

1. **Process: IMPEACHMENT OF RETURN.** Under the provisions of section 370 of the code, affidavits are admissible in evidence to impeach the return of an officer to the service of a summons in proceedings for revivor.
2. —: —. The return of an officer to the service of a summons in the original action may be impeached in a proceeding to revive the judgment.

APPEAL from the district court for Butler county: BENJAMIN F. GOOD, JUDGE. *Reversed*.

W. T. Thompson, for appellant.

Matt Miller, contra.

OLDHAM, C.

This was a proceeding to revive, on motion and affidavit, a judgment entered in the county court of Butler county,

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Nebraska, in a cause within the jurisdiction of a justice of the peace, in which Judson Carpenter was plaintiff and Ed. Johnson, defendant. The suit was on an open account, and was instituted on the 6th day of November, 1891. Summons was returned on November 13, 1891, showing that it had been served on defendant, "by leaving at his usual place of residence, the within named defendant, a certified copy of this summons and all the indorsements thereon." Defendant failed to appear, and judgment by default was entered against him on November 24, 1891. On July 10, 1900, a motion and affidavit for a conditional order of revivor was filed by the plaintiff in the county court of Butler county, and on this motion and affidavit it was ordered by the court that the judgment be revived unless sufficient cause should be shown by defendant against the revivor. Notice of this proceeding was served on the defendant in Merrick county, Nebraska, by the sheriff of that county, and on the 23d day of August, 1900, defendant appeared specially for the purpose of challenging the jurisdiction of the court, for the reason that the real and true name of the defendant was Edmund Johnson, and not Ed. Johnson, and for the further reason that the county court of Butler county never had any jurisdiction over the defendant to enable it to pronounce any valid judgment against him, because no summons was ever legally served upon the defendant at his usual place of residence, or at any other place. In support of this motion defendant filed affidavits tending to show that he had removed from Butler county, on the 29th of October, 1891, and had established a residence at Beaver Crossing, in Seward county, Nebraska, and was residing there at the time the summons was left at his former place of residence in Butler county. Several affidavits were filed in support of this allegation. Plaintiff filed three counter-affidavits, but none of these went further than to show that the service of summons had been had at the place where defendant resided in Butler county, and there was no traverse of the defendant's allegation that he had sold his place in

Butler county, and had removed with all his household goods to Seward county eight or ten days before the summons was attempted to be served. The county court, however, overruled the objections of the defendant and entered an order reviving the judgment. To reverse this judgment of the county court defendant prosecuted his petition in error to the district court for Butler county, where, on a hearing by the court, the judgment of the county court was affirmed and the petition in error dismissed. To reverse this judgment defendant appeals to this court.

It is conceded that, from the showing made in the affidavits, defendant was not a resident of Butler county at the time the summons was attempted to be served, but the contention is that proof of the failure of service of process can not be made on *ex parte* affidavits. It is not necessary to determine whether or not this objection was waived in the county court by filing counter-affidavits on behalf of the plaintiff, as we think that the provisions of section 370 of the code are sufficient to permit the use of affidavits either in attacking or in supporting the return of an officer on a summons in a proceeding for revivor. This section provides: "An affidavit may be used to verify a pleading, to prove the service of a summons, notice, or other process, in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law." In *Walker v. Lutz*, 14 Neb. 274, the return of a sheriff to a summons that he had served it by leaving a copy at the defendant's usual place of residence was attacked by defendant in a motion challenging the jurisdiction of the court. The motion was supported by affidavits and sustained by the district court. The judgment of the district court was affirmed, and the principle announced that "a sheriff's return to a summons that he served it by leaving a copy at the defendant's usual place of residence is not conclusive as to the fact of residence, but the defendant may show that the place where the copy was left was not

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at the time his residence." In this case the only evidence offered to challenge the jurisdiction of the court was in the form of affidavits, and it was held sufficient to support the judgment of the trial court. We have also held that, in a revivor proceeding, the defendant may dispute the return of the officer by showing that the original summons was not served at his usual place of abode. *Haynes v. Aultman, Miller & Co.*, 36 Neb. 257; *Enewold v. Olsen*, 39 Neb. 59; *Wittstruck v. Temple*, 58 Neb. 16. It follows from what has been said that the affidavits filed in support of the special appearance were competent evidence as to defendant's place of residence at the time the summons was attempted to be served, and that he was entitled to show in the revivor proceeding the invalidity of the original judgment for want of jurisdiction over the person of the defendant.

We therefore recommend that the judgment of the district court dismissing the petition in error be reversed and the cause be remanded for further proceedings.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause be remanded for further proceedings.

REVERSED.

DAISY D. MOORE ET AL., APPELLANTS, v. HENRY J. FLACK,
APPELLEE.

FILED JUNE 20, 1906. No. 14,378.

1. **Marriage: EVIDENCE.** Evidence examined, and held insufficient to show a common law marriage between plaintiff's mother and the deceased.
2. **Bastards: ACKNOWLEDGMENT OF PATERNITY.** A writing to constitute an acknowledgment of paternity within the provisions of section 31, ch. 23, Comp. St. 1903, must be one in which the paternity

is directly, unequivocally and unquestionably acknowledged. *Lind v. Burke*, 56 Neb. 785, followed and approved.

3. ———: ———: EVIDENCE. Evidence of a writing, claimed to have been addressed by the deceased, Robert Moore, to the mother of an illegitimate child and said to contain the words, "Take good care of our boy, and call him Thomas Moore, and I will give him a good start some day," examined, and held insufficient to constitute a valid acknowledgment of paternity within the meaning of the statute.

APPEAL from the district court for Kearney county:
CONRAD HOLLENBECK, JUDGE. *Affirmed.*

James Clay, E. C. Calkins, John Lathrop and Joel Hull,
for appellants.

J. C. Paulson and M. D. King, contra.

OLDHAM, C.

On the 18th day of August, 1889, Robert Moore, a former resident of the state of Kentucky, died intestate in Kearney county, Nebraska, seized in fee of a quarter section of land situated in that county. Thereafter J. W. Gilman was duly appointed administrator of the estate, and administration of the estate was finally closed and the administrator discharged in January, 1891. During the progress of the administration the right of heirship to the estate was contested between one John F. Moore, who claimed the estate as a half brother of the deceased, and a minor named Daisy D. Moore, plaintiff herein, who claimed to be the daughter and sole heir of the deceased. The minor claimant was represented in the contest by a guardian *ad litem*, who is her attorney in the present suit. The contest over the heirship was continued from term to term in the county court, and evidence was taken, and the county court found in favor of the alleged half brother and against the claims of Daisy D. Moore. Thereafter the lands in controversy passed by mesne conveyances from John F. Moore to the present defendant, Henry J. Flack,

who purchased them on July 12, 1892, and has since occupied and cultivated the lands as his own. In January, 1903, Daisy D. Moore filed her petition in the district court for Kearney county, alleging ownership of the lands in dispute as the daughter and sole heir at law of Robert Moore, deceased. The petition was subsequently amended and asked, in substance, to set aside the former decree of the county court that declared John F. Moore the sole heir at law of Robert Moore, deceased, alleging that said decree was procured by fraud and perjury, and asking to have all mesne conveyances from John F. Moore to defendant Flack canceled and held for naught, and that the title to the lands in controversy be quieted in her. Another alleged child of Robert Moore, named Thomas Moore, intervened in the suit, and filed a petition in which he alleged that he was the illegitimate son of the deceased, that he had been recognized in writing as such by the deceased in the presence of a competent witness, and that because of such recognition he was entitled to the inheritance as the sole heir at law of Robert Moore, deceased. He further alleged that he was an infant in Kentucky at the time of the proceeding in the probate court of Kearney county, Nebraska, and that he had neither personal nor constructive notice of such proceeding, and that within one year after his arriving at his majority he had intervened in the suit to assert his rights. He also alleged that John F. Moore, to whom the inheritance had been awarded in the county court, was a bastard and not a legitimate half brother of Robert Moore, deceased. Defendant answered each of these petitions, alleging his ownership of the lands by mesne conveyances from John F. Moore, and pleaded the proceeding in the county court as a bar to the claims of both plaintiff and intervener. On issues thus joined there was a trial to the court, and a judgment for the defendant, and the petitions of both plaintiff and intervener were dismissed. To reverse this judgment the plaintiff and the intervener have prosecuted their separate appeals to this court.

We will separately examine the claims of each of the contestants in the light of the evidence revealed in the bill of exceptions. The proof offered in support of the claims of heirship is contained in depositions taken at various places, and from these depositions it appears that Robert Moore, deceased, was born and raised in Rowan county, Kentucky; that he was never married; that his father and mother had each departed this life before his death; that he was the natural father of both plaintiff and intervener, the former by a widow, named Mrs. Steele, and the latter by Miss Omie Oney.

Plaintiff, in support of her claim of heirship, alleged a common law marriage between the deceased and her mother. This claim, however, is wholly unsupported by competent testimony. The evidence of Mrs. Steele, the mother of plaintiff, shows that she never was married to the deceased; that she never claimed to be his wife while she lived with him in Kentucky; that, while he visited her frequently and was the father of her child, yet she makes no claim that they lived together as husband and wife, or that he ever held her out to the world as such. What she does claim is that the deceased promised that he would marry her if she would come to Nebraska with him, and that he would get a minister to perform the ceremony, but that soon after arriving in this state he took sick and died without having any ceremony performed. According to Mrs. Steele's testimony the deceased only lived about ten days after arriving in Nebraska. She further testified that she was drawing a pension as the widow of her former husband (Steele), who was a soldier in the United States army during the rebellion. To our minds this evidence is wholly insufficient to support the claim of a common law marriage between plaintiff's mother and the deceased, and it will therefore be unnecessary to determine whether or not plaintiff is estopped by the judgment of the county court to again assert her right of heirship in the lands of the deceased.

As this disposes of plaintiff's petition, we will now

examine the contention of the intervener and the sufficiency of the testimony offered to support his claim under section 31, ch. 23, Comp. St. 1903, which provides: "Every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child." It appears from the testimony that the deceased had been adjudged the father of the intervener in a bastardy proceeding instituted against him in the county court of Rowan county, Kentucky; and it was the recollection of the county judge presiding at the trial that the deceased had admitted in court that he was the father of the child. But there is no evidence that such admission was made, if at all, in writing. The intervener also introduced the deposition of one Allan Gearheart, who testified that he had resided for many years in Rowan county, Kentucky, and that he had known the deceased, Robert Moore, since 1870; that he last saw him at Farmers, Rowan county, Kentucky, shortly before he went to Nebraska, and he further testified as follows: "(6) The last time you saw Robert Moore, did you or not have any conversation with him relative to Omie Oney's bastard child Thomas? If so, state all the facts fully. A. Yes, sir. We were talking about Omie Oney's bastard child in Farmers, Rowan county, Kentucky, and he (Robert Moore) said he wanted to get the child away from her. He said it was his child. He said he had had the child adopted by her consent and he wanted me to assist him in getting the child away. (7) Did he or not say or do anything else on that occasion in this connection? A. Yes, sir. He wrote her (Omie Oney) a note. (8) Where is that note, if you know? A. I don't know where it is. I gave it to Omie Oney. (9) Do you remember what was in the note, or the substance of what was in it? A. Yes, sir; in part. (10) Do you remember the substance of what was in the note? A. Yes, sir. (11) Please state all that was in the note, or substance of same; what you did with the note. A. It says: 'I am going to leave. I have to leave you. I

bid old Kentucky good bye for a while. I don't just know when I will be back. Take good care of our boy, and call him Thomas Moore, and I will give him a good start some day.' And I gave the note to Omie Oney, and read it for her. She could not read. (12) Is what you have stated all of the substance of what the note contained? A. It is all that I remember. (13) How far was Farmer, Rowan county, Kentucky, from where Omie Oney lived at that time? A. Five miles west. (14) Did Omie Oney at that time live near a postoffice or telegraph station? A. Not nearer than Moorehead, three miles. (15) How often did she (Omie Oney) go to the postoffice? A. I don't know that she ever went. * * * (18) Were you or not very intimate with Robert Moore? A. Yes, sir. We were particular friends. (19) Did you or not ever see Robert Moore with Thomas Moore? If so, state the facts relative thereto. A. Yes, sir, I have seen him with the child and nursing the child. After Omie Oney moved on my place, Robert Moore would come over and stay two days at a time with the child, staying at my house at night."

Witness on cross-examination said that the letter was written and signed in his presence. He also testified that he knew that Omie Oney could neither read nor write and that was the reason that he read her the note. He said there were other things in the note, but not very many, and that he had not thought of the note during the 16 years intervening between the day he read it and the day he gave his deposition. Omie Oney testified that she could neither read nor write, but that she remembered the contents of the note, just as stated by Gearheart, and that she put the note away in a paper box with some other papers, and that it was lost, and she was unable to find it. It is clear that the evidence with reference to the bastardy proceeding is wholly insufficient to show an acknowledgment within the provisions of section 31, *supra*. So the only question is as to the sufficiency of the testimony of Gearheart and Omie Oney to establish an acknowledg-

ment, in writing, by the deceased of the paternity of the intervener. There are many facts and circumstances surrounding this alleged writing which are, in themselves, neither satisfactory nor clearly convincing either as to the exact contents of the writing or as to the probability of its ever having been executed. While it is true that the witness of the instrument is unimpeached, and the mere fact that he testified by deposition should not, and does not, in any manner impair the credibility of his testimony, yet the circumstances surrounding the writing sought to be proved are of such a nature as to demand that proof of the contents of the note, as alleged, should be very carefully scrutinized. At the time the communication is alleged to have been written, intervener's mother was living on a place owned by the witness Gearheart, and both the witness and the deceased knew that she was wholly illiterate, and it is hard to conceive what object deceased would have had in sending Gearheart with a written message to read to her when he might as well have communicated with her orally.

But, passing from the dubious circumstances surrounding the proof of the writing to its contents, the question arises: Is it a sufficient recognition to create an heirship within the meaning of section 31, *supra*? The material portion of this note as testified to is: "Take good care of our boy, and call him Thomas Moore, and I will give him a good start some day." In *Lind v. Burke*, 56 Neb. 785, the sufficiency of an acknowledgment of paternity under this section of the statute was examined into, and, while the question as to whether the instrument must have been acknowledged with the intent to create a right of heirship was not determined, yet it was there said:

"We are satisfied that a writing, to fulfil the requirement of the law * * * must be at least one in which the paternity is directly, unequivocally, and unquestionably acknowledged." It is further said in the opinion: "It must not be forgotten in this examination that it is not because the person can be shown to be the offspring, or is

in fact the illegitimate child, that it may assert heirship, but because it has been in writing acknowledged; and hence the writing must be in and of itself sufficient, unaided by extrinsic evidence, to establish the paternity."

Under the rule here announced, the writing relied on is clearly insufficient. The reference to intervener as "our boy" in the note is not a clear and unequivocal acknowledgment of the paternity of the boy. Nor is the request that the child be named Thomas Moore equivalent to an acknowledgment that Robert Moore was the natural father of the child. Nor is the promise that "I will give him a good start some day" inconsistent with any other theory than that the writer of the note was the father of the child. In the later case of *Thomas v. Estate of Thomas*, 64 Neb. 581, it was decided that it was immaterial whether or not the writing was made with the intent to constitute an heirship, but the rule of strict construction of writings of this nature, when made, as announced in *Lind v. Burke*, *supra*, was not modified.

We are therefore of opinion that the evidence offered by the intervener is insufficient to establish his claim of heirship, and we recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ORRELIOUS A. HERING, APPELLEE, v. EMMA SIMON,
APPELLANT.

• FILED JUNE 20, 1906. No. 14,395.

1. **Costs.** Attorney's fees cannot be taxed as costs against the successful litigant in an action at law or in equity.
2. ———. In an action in equity the trial court has a sound discretion in taxing the costs of the action to the different litigants, but this discretion is subject to review when unreasonably or arbitrarily exercised.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed except as to costs.*

Kirkpatrick & Hager, for appellant.

George A. Adams and George W. Berge, contra.

OLDHAM, C.

This was an action for the specific performance of a contract for the sale of real estate. Issues were joined on the petition of plaintiff Hering and the separate answer of defendant Emma Simon. The general finding of the trial court was, in substance, that the facts adduced in evidence did not warrant a specific enforcement of the contract, but that they did warrant its annulment and cancelation, and a decree was entered annulling and canceling the contract. After this decree, the court made the following additional finding: "That the defendant, Emma Simon, is not entirely without fault in the premises; that while in the discretion of the court the said contract should not be ordered to be specifically performed, the said defendant, Emma Simon, ought to pay the costs of this litigation and reasonable attorney's fees of the plaintiff in the sum of \$200; that the plaintiff is entitled to judgment against her in that amount." This finding was followed by an order and judgment awarding a recovery by plaintiff from defendant in the sum of \$200 for attorney's fees and the

costs of the action. From this judgment for costs and attorney's fees defendant has appealed to this court.

There is no complaint as to the general judgment and decree, and the appellee has not seen fit to favor us with a brief in support of the finding and judgment in favor of plaintiff for attorney's fees and costs. We have examined the evidence contained in the record and are satisfied that the decree refusing specific performance and canceling the contract is supported by the testimony; but the rule in this jurisdiction against taxing attorney's fees as costs in a legal or equitable action, unless provided for by statute, is too well established to require the citation of authorities, and there is no statute which in any case permits the taxing of attorney's fees against the successful litigant. While in equity cases the court has a sound discretion in taxing the costs of the litigation, yet this discretion, when arbitrarily or unreasonably exercised, is subject to review. From our examination of the record in this case, we are of opinion that it is unjust and inequitable to tax the entire costs of the trial of the cause against the defendant, but we think it both just and equitable that each of the litigants should pay his own costs.

We therefore recommend that the judgment of the district court, in so far as it awards plaintiff a recovery of attorney's fees and the entire costs of the action, be reversed and the cause remanded, with directions to enter a judgment against each party for his own costs.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that the judgment of the district court, in so far as it awards a recovery of attorney's fees and the entire costs of the action, be reversed and the cause be remanded, with directions to enter a judgment against each party for his own costs.

JUDGMENT ACCORDINGLY.

Gregory v. Village of Franklin.

ELLA GREGORY ET AL., APPELLEES, v. VILLAGE OF FRANKLIN,
-APPELLANT.

FILED JUNE 20, 1906. No. 14,403.

Cities: DETACHING TERRITORY: REVIEW. A judgment of the district court in a proceeding under the statute, section 101, art. I, ch. 14, Comp. St. 1903, to detach territory from a municipal corporation, will not be impeached upon appeal in the absence of a showing that the trial judge committed an important mistake of fact, or made an erroneous inference of fact or of law. *Michaelson v. Village of Tilden*, 72 Neb. 744, followed and approved.

APPEAL from the district court for Franklin county:
ED L. ADAMS, JUDGE. *Affirmed.*

H. Whitmore, for appellant.

Albert R. Peck and *H. W. Short*, *contra*.

OLDHAM, C.

On the 23d day of January, 1905, the plaintiffs in the court below filed their petition under the provisions of section 101, art. I, ch. 14, Comp. St. 1903, asking that their respective pieces of land, therein described, be detached from the village of Franklin, in Franklin county, Nebraska, alleging as reasons therefor that "the said lands and all of the same are used for agricultural and farming purposes only and are not benefited by such incorporation in any manner; that they nor any of said described tracts are used for village purposes; that they are not properly subject to being included in said corporate limits of said village of Franklin, and your petitioners and applicants are a majority of the legal voters, and the only owners and occupants of any and all of said tracts of land; and, further, your petitioners and applicants allege the facts to be that said tracts, nor any of them, have ever been surveyed or platted into blocks or lots for town or village purposes; but that, while not legally subject to such, the said tracts,

and each and every of them, have been listed and assessed with village taxes for each and every year since the incorporation of said village of Franklin." The village, for answer to this petition, alleged that it was duly incorporated in July, 1883; that all the pieces of land described in plaintiff's petition were included within the legal limits of said village at the time of its incorporation; that the village has ever since that time exercised corporate powers over such lands; and that at the time of the incorporation of said village its population was only 290, but that its population had increased until it now contained more than 900 inhabitants; that none of the plaintiffs, except the Franklin County Agricultural Society, owned any of the land described in their petition at the time of the incorporation of the village, but that each and all of them severally became owners of said land a long time afterwards with full knowledge that the same were included within the corporate limits of the village. It further alleged that the land owned by the agricultural society has never been assessed for village purposes; that the land of plaintiff Gettle contains 40 acres, and has a residence and a flouring mill thereon, and immediately joins the platted part of the village; and that the land of plaintiff Rose contains 40 acres, and corners with the platted part of the village, and has located thereon a residence and also a park, which is used for public assemblages, camp meetings, dances, etc.; and that the remainder of the lands are used for agricultural purposes. The answer further alleged that all the land described in the petition is suburban in character and is adaptable to being cut up into residence lots containing a few acres, but admits that none of the land has been platted and that, except as above stated, it is used for agricultural purposes. There was a reply to this answer in which all the facts pleaded, except the adaptability of the land for suburban residences, were admitted. Plaintiffs thereupon filed a motion for judgment on the pleadings. According to the record, the court took the case under advisement until the succeeding term, when he

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entered judgment as prayed for in plaintiffs' petition. There is no bill of exceptions containing any evidence offered in the proceeding, and, as there was no issue of fact, except as to the adaptability of the land for suburban residences if surveyed in small tracts, it is probable, although the judgment does not so recite, that the case was determined on the pleadings alone.

Section 101, *supra*, is a provision for disconnecting territory from cities and villages, which is rather administrative than judicial in its nature. It makes a provision by which a majority of the legal voters residing on any territory within and adjacent to the corporate limits of any city or village, if they desire to have the same disconnected therefrom, may file their petition in the district court of the county in which the city or village is situated, praying to have such territory disconnected, and that on the filing of such petition a notice shall be served on the village within ten days, and if on the receipt of the notice the village or city, by a majority vote of all members elected to the common council or board of trustees, consent that such territory be disconnected, the court then shall enter a decree disconnecting the territory, without cost to the village. It further provides that, if the village desires to contest the severance of the territory, it shall file its answer within 30 days after service of a copy of the petition, and that issue shall thereupon be joined and the cause shall be tried by the court as a suit in equity. The act also provides for a review of the judgment of the district court either on appeal or by error proceedings. In construing proceedings under this section of the statute, we held, in the recent case of *Michaelson v. Village of Tilden*, 72 Neb. 744:

"A judgment of the district court in a proceeding under the statute, section 101, art. I, ch. 14, Comp. St. 1903, to detach territory from a municipal corporation, will not be impeached upon appeal in the absence of a showing that the trial judge committed an important mistake of fact, or made an erroneous inference of fact or of law."

There is certainly nothing before us in this record that shows either a mistake of law or fact by the trial judge. The right to have unplatted farm lands disconnected from the corporate limits of cities and villages has been asserted by this court in actions entirely independent of this section of the statute. See *Village of Osmond v. Smathers*, 62 Neb. 509, and *State v. Dimond*, 44 Neb. 154. The answer of the village does not allege that the village was in debt at the time the application for severance was made, or that public money had been expended in grading and improving the streets and sidewalks of the village along the lands owned by the plaintiffs, nor was there any allegation that improvement bonds of any nature had been voted upon the city by the acquiescence of the owners of the property sought to be relieved from corporate taxation. In fact, there is nothing in the answer of the village which interposes an equitable objection to the prayer of the petition.

We are therefore of opinion that the judgment of the district court should be affirmed, which we accordingly recommend.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

BENJAMIN F. MOORE, APPELLEE, v. ROBERT F. NEECE ET AL., APPELLEES; FRED W. CLARKE, APPELLANT.

FILED JUNE 20, 1906. No. 14,423.

Judicial Sales: APPRAISEMENT. Where lands constituting one body are used as a single tract, ordinarily they may for judicial sale be appraised together. *Smith Bros. Loan & Trust Co. v. Weiss*, 56 Neb. 210, followed and approved.

APPEAL from the district court for Sioux county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Albert W. Crites, for appellant.

W. H. Fanning and Allen G. Fisher, contra.

OLDHAM, C.

This is an appeal from an order of confirmation of a sale in a mortgage foreclosure proceeding. Two objections are urged in the brief of the appellant. The first is that the appraisers did not actually view the land appraised. The only evidence filed in support of this allegation was the affidavit of the foreman of the mortgaged ranch, who testified that he did not see the appraisers on the ranch on the day of the appraisal, and that he thought that if they had been there he should have seen them. This evidence is wholly insufficient to impeach the return of the appraisal, which shows that it was made on actual view of the premises.

The next objection urged is that the mortgaged premises were not sold in separate tracts of 40, 80 or 160 acres each, after application had been made to the sheriff by the owner of the equity of redemption to so sell the mortgaged property. The evidence offered on this objection showed that the entire tract of land covered by the mortgage contained about 2,080 acres, was a cattle ranch situated in Sioux county, Nebraska, composed of contiguous tracts of land forming one ranch, and that it had been inclosed and buildings erected upon it in the year 1886 by the Bartlett Richards Cattle Company; that it had been several times transferred as a single property, and was known as the "Lower 33 Ranch" on Running Water river; that the value of the property depended on its use as a whole for feeding and raising cattle, and that to subdivide it into quarter sections would tend to destroy its value as a ranch. Under this showing the rule announced in the early case of *Laughlin v. Schuyler*, 1 Neb. 409, requiring separate and independent tracts of land covered by a mortgage to be sold separately, has no application. But the facts in the

case bring it within the rule announced in *Smith Bros. Loan & Trust Co. v. Weiss*, 56 Neb. 210, wherein it was said: "Where lands constituting one body are used as a single tract, ordinarily they may, for judicial sale, be appraised together."

We therefore conclude that the learned trial court was justified in overruling the objections to the confirmation of the sale, and we recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WILLIAM STANSBURY V. M. S. STORER ET AL.

FILED JUNE 20, 1906. No. 14,190.

Petition: DEMURRER. A petition alleging the making of a verbal building contract and partial performance thereof by the plaintiff, and claiming damages on account of defendant's failure to perform the same, is not subject to demurrer because it fails to allege the time within which the contract was to be performed.

ERROR to the district court for Nuckolls county: **LESLIE G. HURD, JUDGE.** *Affirmed.*

Cole & Brown, for plaintiff in error.

S. A. Searle, contra.

EPPERSON, C.

The defendants in error as plaintiffs sued the plaintiff in error as defendant in the district court for Nuckolls county upon two causes of action. Plaintiffs alleged that they had entered into a contract with the defendant whereby the plaintiffs, as builders, were to furnish mate-

rial for and construct a building for defendant; that pursuant to the provisions of the contract they began the construction of the building, furnished labor, and also furnished material which was subsequently appropriated by the defendant. Plaintiffs under their first cause of action claimed damages for the value of the material appropriated by defendant, the labor employed upon the building, and the loss of profits occasioned by the defendant's failure to comply with the contract. For a second cause of action the plaintiffs alleged that an injunction suit was instituted by the defendant against the plaintiffs to restrain the plaintiffs from proceeding with the construction of the building; that an injunction bond was given in such proceeding upon the issuance of a temporary restraining order; that such temporary order was subsequently dissolved; that the plaintiffs were damaged to the extent of \$400 on account of expenses incurred in resisting the injunction, for which they allege the defendant is liable on the bond. In answer to the first cause of action defendant denied the making of the contract; denied that plaintiffs furnished material or did any work under the terms of such contract; and, in answer to the second cause of action, admitted the institution of an injunction suit; alleged that it was undetermined, that at the time of the filing of such answer it was pending in this court, and that no action had accrued in favor of the plaintiffs against the defendant by reason thereof. A trial was had to a jury, which found due the plaintiffs on their first cause of action \$483.55, and upon the second cause of action \$250, a total of \$733.55, for which amount a judgment was rendered in favor of plaintiffs. The defendant alleges many errors of the trial court and seeks a reversal of the judgment.

By instruction No. 8 the court charged the jury, in substance, that the measure of plaintiffs' damages on account of the materials furnished and work done was the loss of profits which they would have made in carrying out the contract, that is, \$1,158 agreed compensation less the amount it would have cost them to furnish the labor and

material for its performance. Defendant alleges error in the giving of this instruction for the reason that it assumes that the contract was made, which, being denied, was a question for the jury to determine. The sum of \$1,158 was the contract price alleged by plaintiffs and denied by defendant. However, considering this instruction with others given by the court, the jury were clearly and properly charged in effect that, before they could find for the plaintiffs, they must find that the contract alleged by them had been made, and that, in case they should so find, then they should measure the damages according to the rule laid down in instruction No. 8. This assignment of error, therefore, is without merit.

The court gave instruction No. 3, requested by the plaintiffs, which contained the following: "The jury are further instructed that, in case you find from the evidence that the plaintiffs and defendant entered into the contract for the construction of the building referred to, and that the defendant prevented the plaintiffs from performing the same without fault on the plaintiffs' part, the plaintiffs are entitled to recover, under their first cause of action, the value of the labor and materials used and appropriated by the defendant as measured by the contract price, as you shall find the same from the evidence." The defendant overlooks the first few lines of this instruction, and complains of that part beginning: "Plaintiffs are entitled to recover," claiming that in substance the court said to the jury: "That there is a contract; that there is an agreed contract price; that the plaintiffs herein appropriated materials and labor." This contention, if we understand it, is wholly without merit.

Similar objections are made to instructions Nos. 4 and 5, relative to the items subject to recovery and the date of the contract; such instructions to govern in the event that the jury found that the contract was in fact made. An instruction given by the trial court, or a part thereof, should not be isolated from other instructions or other parts of the same instruction, but all should be read

together, and if, as a whole, the law applicable to the facts and the pleadings is fully and properly given, as they were in this case, no reversible error is committed by the court.

Defendant contends that the court erred in overruling a demurrer to the petition, claiming that there is a misjoinder of causes of action, and that the petition does not state facts sufficient to constitute a cause of action. Plaintiffs failed to allege the time within which the contract was to be performed. The omission of such an allegation did not render the petition demurrable. The two causes of action were connected with the same subject matter, and therefore the petition was not subject to demurrer for misjoinder.

After the issues had been formed and the case ready for trial, the defendant filed a motion for leave to amend his answer by alleging that in January, 1900, and while the injunction suit above referred to was pending, and while there was also pending another suit between the same parties relating to an entirely different matter, the parties hereto settled their differences. The court overruled this motion. The settlement which defendant sought to plead by the proposed amendment was made in January, 1900, almost five years before the amendment was offered. There was no abuse of discretion in the refusal of the trial court to permit the amendment to be made.

To defeat the second cause of action, the defendant relied upon the fact that a supersedeas had been had of a judgment entered *nunc pro tunc*, dismissing the injunction suit in which the bond sued on had been given. No competent evidence was introduced showing that the proper bond had been filed. Defendant now contends that, as the petition failed to allege the termination of the injunction suit, evidence that the judgment therein had been superseded was not required. An examination of the pleadings discloses that the facts relative to the injunction suit were made an issue by the answer and reply. Possibly, however, the burden was upon the plaintiffs to show that their second cause of action had accrued. It is unneces-

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sary to decide this proposition for the reason that the evidence introduced by defendant, including the opinions of this court in *Stansbury v. Storer & Ellis*, 70 Neb. 603, and *Stansbury v. Storer & Ellis*, 3 Neb. (Unof.) 100, proves that the injunction suit was in fact finally determined in 1899. This suit was instituted in 1903. The court instructed the jury as a matter of law that the injunction suit had terminated at the time this suit was instituted. Under the evidence, the instruction was proper.

There being no error in the record, we recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JAMES C. BRINKWORTH ET AL., APPELLANTS, V. EMANUEL
SHEMBECK, APPELLEE.

FILED JUNE 20, 1906. No. 14,356.

Liquor License: BURDEN OF PROOF. The burden of proof is upon an applicant for liquor license to prove that he is a man of respectable character and standing, when by remonstrance such fact is denied.

APPEAL from the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Reversed with directions.*

E. O. Kretsinger, for appellants.

Rinaker & Bibb and *Hazlett & Jack*, contra.

EPPERSON, C.

A petition signed by 34 persons was presented to the city council of the city of Beatrice, praying that a license be

granted to one Shembeck to sell malt, spirituous and vinous liquors in the Second ward of said city. It was stated in the petition that the petitioners were resident freeholders of said ward; that said Shembeck is a man of respectable character and standing, and a resident of the state of Nebraska; and it was prayed that a license be granted to him. The city council granted the license as prayed. On appeal to the district court, the order of the council was affirmed, and remonstrants bring the case to this court for review. Many assignments of error are argued in the brief of counsel, but, as we view the case, it is only necessary to consider the one which challenges the sufficiency of the evidence to support this petition.

Our statute provides for the granting of a license upon the application by petition of a majority (or 30) of the resident freeholders of the precinct where the sale of such liquor is proposed to take place, setting forth, among other things, that the applicant is a man of respectable character and standing, and praying that license shall be granted to him. In the case at bar no evidence was introduced to show that applicant was a man of respectable character and standing, or that he was a resident of the state. These allegations of the petition were specifically denied by remonstrants, and the applicant's character and standing were assailed by an allegation that he was a common and habitual drunkard. The question presented for decision is whether under these allegations it devolved upon the applicant to prove that he is a man of respectable character and standing. This court said in *In re Tierney*, 71 Neb. 704: "The licensing board has no right to grant a license until it has made satisfactorily to appear that the person to whom the license is to be granted, and who is to run the saloon, is a man of respectable character and standing, and that he is a resident of the state." See also *In re Krug*, 72 Neb. 576.

In 11 Am. & Eng. Ency. Law (1st ed.), p. 661, it is said: "Where the statute requires that every applicant for a liquor license shall be a 'fit person to be intrusted with the

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sale of intoxicating liquors,' on application being made to obtain a license to retail liquors, and a remonstrance filed thereto on account of the alleged immorality and unfitness of the applicant, the burden is upon such applicant to prove his innocence." See also *Goodwin v. Smith*, 72 Ind. 113, 37 Am. Rep. 144; Black, *Intoxicating Liquors*, sec. 162. The record in the present case does not disclose that the board passed upon the character and standing of the applicant. The law requires the applicant to allege that he was of respectable character and standing, and the burden of proving this allegation by a preponderance of the evidence was upon him. There is a total failure of proof upon this point.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with directions to cancel the license and dismiss the petition.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to cancel the license and dismiss the petition.

REVERSED.

PETER J. POELS ET AL., APPELLANTS, v. CHARLES B. WILSON,
APPELLEE.

FILED JUNE 20, 1906. No. 14,385.

Verdict: REVIEW. When the amount of damages awarded by a jury cannot be ascertained from the facts proved, the verdict should be set aside.

APPEAL from the district court for Seward county:
ARTHUR J. EVANS, JUDGE. *Reversed*.

McGilton, Gaines & Storey and M. D. Carey, for appellants.

C. H. Aldrich and Norval Bros., contra.

EPPERSON, C.

In June, 1903, the defendant shipped to London 223 head of fat cattle. Through arrangements with plaintiff's agent in New York, the cattle were consigned to the plaintiff, a commission firm engaged in London in selling cattle and other animals for slaughter. At New York the plaintiff advanced \$82.62 a head, making a total of \$18,424.26. At London one of the cattle was crippled in unloading. It was slaughtered and marketed as dressed beef by the plaintiff. The other cattle were sold by plaintiff in the Deptford market. The total proceeds, after deducting plaintiff's commission and expenses, amounted to \$386.22 less than the sum advanced to defendant by the New York agent. After the sale of the cattle the defendant, who accompanied them to London, requiring a sum of money to pay the expenses of his return trip, received \$252.72 from the plaintiff. The plaintiff instituted this action to recover the said sums of \$386.22 and \$252.72. The plaintiff alleged that the \$252.72 advanced to the defendant was a loan. Defendant contends that prior to the sale he instructed the plaintiff to sell the cattle by dressed weight; that plaintiff disregarded these instructions and sold the cattle as live weight; that by reason thereof the defendant was damaged in the sum of \$3,825, which he sets up as a counter-claim, and for which he asks judgment against the plaintiff. A trial was had in the district court for Seward county, which resulted in a verdict and judgment for defendant in the sum of \$692.58. The plaintiff prosecutes error to this court, and contends that the verdict is not supported by the evidence.

Plaintiff argues that the verdict is not supported by the evidence for the reason that no proof was adduced to

show the measure of damages. The evidence shows the weight of the cattle at the time of shipment from Nebraska, and testimony was introduced to prove the difference between the weight on foot and dressed weight. From all of this the defendant computes the number of pounds which his cattle would have weighed dressed, and asks the jury to allow him 12 cents a pound therefor. The only evidence in the record which tends to show the value of dressed beef in London was the testimony of the defendant and some of his witnesses to the effect that Mr. Poels, plaintiff's manager and member of the firm, told them on the day of the sale that the best dressed beef was worth 12 cents a pound, and, further, that the offal was worth \$15 a head. This evidence is not very satisfactory. There is no claim of fraud. The parties were not negotiating for the sale and purchase of the cattle. Their relationship was that of principal and agent. Each was interested in securing the highest price. The statements of plaintiff's manager were admitted in evidence for the purpose of proving market prices. The competency of such evidence is very doubtful, but unnecessary for us to determine, as the verdict must be set aside for the failure of other necessary proof. Nowhere does it appear what would have been the cost of slaughtering and dressing the cattle. There is considerable evidence tending to show the relative value of the isolated crippled steer and the other cattle, and to the effect generally that the isolated steer was worth \$25 less than the others. Plaintiff accounted to defendant for the crippled steer in the sum of \$89.16. Defendant's evidence shows that this particular steer was inferior to at least 140 head of the cattle sold on foot. In the account returned by plaintiff to defendant, no charge was made for slaughtering and marketing this steer, and defendant contends that the sum received for this one animal was a sufficient guide for the jury in measuring the damages. Such a conclusion, however, can be drawn only by an unreasonable inference. While it appears from the account rendered to the defendant that \$89.16 was the net

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proceeds of the crippled steer, yet, when we consider that that was only a small part of a very large transaction between the parties wherein numerous items of expense were charged, we cannot conclude that all of the 223 head of cattle could have been disposed of and a return made to the defendant herein at that rate. There may have been gratuitous services rendered, or expenses paid by plaintiff without specific charge therefor. We conclude that there was not sufficient proof as to the measure of damages, and that the verdict should not be sustained.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

WILLIAM C. REED, APPELLEE, v. PERRY R. BURRELL ET AL.,
APPELLANTS.

FILED JUNE 20, 1906. No. 14,398.

Government Monuments: EVIDENCE. When a government monument, being the corner between two adjoining landowners, has been obliterated, its location may be proved by testimony of witnesses acquainted therewith.

APPEAL from the district court for Frontier county:
ROBERT C. ORR, JUDGE. *Affirmed.*

Starr & Reeder, for appellants.

W. S. Morlan, C. H. Tanner and L. M. Graham, contra.

EPPERSON, C.

This is an action in ejectment. The land in controversy is a tract of about two acres, which plaintiff claims is a part of the southeast quarter of the northeast quarter of section 28, town 7, range 27, Frontier county, to which he holds a deed. Two questions of fact were at issue: (1) Was the land a part of the southeast quarter of the northeast quarter above referred to? (2) If so, had defendant acquired title thereto by adverse possession? The verdict and judgment were for the plaintiff, and the defendant appeals to this court.

1. The land is a narrow strip bounded on the north by the channel of Medicine creek, which defendant contends is the boundary line. Plaintiff offered in evidence a plat of the premises, which was admitted over objection. The plat showed certain distances not measured by the witness who made the plat, but, as to the controlling fact, that is, the location and dimensions of the tract involved, the map was shown by several witnesses to be substantially correct, and as to the defense of adverse possession the admission of the plat was not prejudicial.

2. Several witnesses testified as to the location of the boundary line as shown by the corner monument established by the federal government. One witness, who formerly owned plaintiff's land, testified that he had perpetuated the government monument, first by a cedar post, and later by a gas pipe, the original mark being about to be obliterated on account of the construction of a public highway. All of the above evidence was objected to by defendant, who now alleges error in the admission thereof. It is of general knowledge that the government surveys are often irregular, and that the quarter section monuments do not in all instances indicate a point midway between the section corners. In case of a dispute as to the location of a division line, the government monument controls, and, where it has become obliterated, its former location may be established as any other fact in issue.

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This court had similar evidence under consideration in the case of *Kittell v. Jenssen*, 37 Neb. 685, in which it is said: "Where a government corner between two adjoining land-owners has been obliterated, the exact location of the corner may be determined by the jury from the evidence in an action of ejectment." The evidence complained of was properly admitted, and, with other evidence, established the fact that the land in controversy was a part of the southeast quarter of the northeast quarter of section 27 aforesaid.

3. The defendant entered upon the southeast quarter of said section in March, 1889, and contends that at that time he took possession of the land in controversy, and since then has been in the open, notorious, exclusive, adverse possession thereof, and introduced evidence tending to support this contention. We consider it unnecessary to review the evidence in detail. The land involved was not under cultivation. It was inclosed with defendant's land, and, being on the banks of the creek, was used by the defendant as a watering place for his cattle. A gate was established on the section line at the east end, which does not appear to have been necessary for the use of the defendant. Plaintiff passed over the land in going to and from his fields lying west thereof. Plaintiff testified that, as the land was not under tillage, he suffered the defendant to use the same as a place for watering cattle. One witness, who owned plaintiff's land in 1899, testified that at that time he had a conversation with the defendant in which witness spoke of the boundary line as being where plaintiff now contends that it is; that defendant then recognized such as true, and that witness verbally gave to defendant the privilege of using the land. This testimony is not denied by the defendant. The evidence presented a question of fact for the jury to determine, and we do not feel warranted in interfering with the verdict.

4. Many other assignments of error are argued relating to the instructions of the trial court and the admission of

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evidence. We have examined all of these assignments and fail to find prejudicial error.

We therefore recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

LINCOLN TOWNSHIP, APPELLANT, v. KANSAS CITY & OMAHA
RAILROAD COMPANY ET AL., APPELLEES.

FILED JUNE 20, 1906. No. 14,377.

1. **Railroads: FORECLOSURE SALE: LIABILITY OF PURCHASER.** A railroad corporation which succeeds to the property and rights of another railroad corporation through the medium of a sale upon a decree of foreclosure, or other judicial sale, is not answerable for the general debts of the corporation whose property and franchises are thus acquired.
2. **Parties.** The right of a township in this state to maintain an action to recover the value of bonds voted by the electors of the township to aid in the construction of a railroad doubted.

APPEAL from the district court for Kearney county:
CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Joel Hull and E. C. Calkins, for appellant.

J. W. Deweese and J. L. McPheely, contra.

DUFFIE, C.

The plaintiff and appellant is one of the organized townships of Kearney county, Nebraska. Its petition filed in the district court in this case is very voluminous, but the material facts may be briefly stated as follows: In the year 1887 the Burlington & Missouri River Railroad Com-

pany, which then was and still is a part of the Chicago, Burlington & Quincy system, owned and operated all the railroads in Kearney county. About this time the defendant, the Kansas City & Omaha Railroad Company, was organized and projected a line from Fairfield in Clay county to Alma in Harlan county. It solicited aid from the people of Lincoln township and, as an inducement to voting bonds, represented to the electors of the township that the road would be operated in close traffic connection with the St. Joseph & Grand Island Railroad, and with the Union Pacific Railroad and the various other lines known as the Union Pacific system; that it would give the people of the township the advantage of a competitive road, and increase their facilities for reaching competitive markets and the interchange of business with the various towns and cities reached by the roads of the Union Pacific system. Acting upon these inducements the electors of the township on March 26, 1887, voted aid to the extent of \$23,500. The road was constructed, the aid bonds delivered to the company, and the road operated according to the representations made until about June 1, 1902. It is further alleged that the Kansas City & Omaha Railroad Company had issued bonds and secured them by a mortgage upon its road and franchises, and that the mortgage was foreclosed in the United States circuit court for the district of Nebraska in 1896, and the road and its franchises sold to the Kansas City & Omaha Railway Company; that said new company took possession about September, 1896, and continued to operate the same in traffic connection with the Union Pacific and Grand Island systems, and in competition with the Chicago, Burlington & Quincy system, until July 1, 1902; that on that date the Kansas City & Omaha Railway Company ceased to operate the road and surrendered it to the Burlington & Missouri River Railroad Company, which road has ever since operated the same as a part of the Chicago, Burlington & Quincy system. It is further alleged in the petition that the circuit court of the United States, in its

decree foreclosing the mortgage made by the Kansas City & Omaha Railroad Company, expressly reserved to said court the right to retake and resell all said property, rights and franchises in satisfaction of any judgment which might thereafter be found against said Kansas City & Omaha Railroad Company upon any liability then existing against said company. Upon the theory that the representations made by the agents of the Kansas City & Omaha Railroad Company to secure the voting of bonds in aid of its construction constitute a contract between the company and the township and its electors, and that said contract has been breached by the failure of that company and its successors in the ownership of the road to operate the same in connection with the Union Pacific and Grand Island systems, and in competition with the Chicago, Burlington & Quincy system, this action was brought to recover the value of the bonds donated to said road. A demurrer to this petition was overruled, after which the defendants answered, and a trial resulted in a judgment for the defendants which we are asked to review.

It is true that in *Wullenwaber v. Dunigan*, 30 Neb. 877, and in *Nash v. Baker*, 37 Neb. 713, an action was maintained by a taxpayer to enjoin the issue of bonds voted in aid of a railroad company, upon the ground that false and fraudulent representations had been made by the company through its officers and agents by which the electors were induced to cast an affirmative vote upon the proposition. But in these cases the one whose property was to be affected, whose rights were endangered, was the plaintiff in the action. After a somewhat extended examination, we have failed to find any case which is a precedent for the one under consideration. The cases cited and relied upon by this court in its opinion in *Wullenwaber v. Dunigan*, *supra*, are all cases where the interposition of the court was sought to protect a plaintiff against the enforcement of a right claimed by the defendant, but grounded upon fraudulent acts of the railroad company or those of its agents. *Curry v. Supervisors of Decatur County*, 61

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Ia. 71, 15 N. W. 602, and *Sinnott v. Moles*, 38 Ia. 25, were cases to enjoin the collection of a tax voted in aid of a railroad company, the electors being induced to this course by false and fraudulent representations made by the company through its agents. *Wickham v. Grant*, 28 Kan. 517, and *Melendy v. Keen*, 89 Ill. 395, were actions upon obligations given by the defendants to aid a railroad company in the construction of its line. The defendants pleaded that the obligations were obtained from them through false and fraudulent representations made by the agents of the company, and this defense was held good. *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Vreeland v. New Jersey Stone Co.*, 25 N. J. Eq. 140, and *Davis & Co. v. Dumont*, 37 Ia. 47, hold that subscriptions to the stock of a corporation, if procured by fraud, will be set aside. *Burhop v. City of Milwaukee*, 18 Wis. 453, holds that a court of equity may relieve the cloud of a mortgage given a railroad company to secure a note executed as a stock subscription to the corporation when fraudulently obtained. And *McClellan v. Scott*, 24 Wis. 81, holds that fraudulent representations made by a railroad company relating to its pecuniary condition are a ground for avoiding a contract of sale of land obtained thereby. None of these cases is authority in support of the claim of the plaintiff in this action. In each of them the action was brought or the defense maintained by the party directly interested and who would have been damaged by the enforcement of the contract. Another feature of these cases which does not obtain here was that fraud was the ground of the action. In this case no charge of fraud is made. From 1887 to 1896 the original company to which this aid was voted operated its road, and performed every condition upon which the aid was obtained and every representation made to the electors. Through no fault of its own and because of its inability to pay its just obligations, its property was sold under a decree of the United States circuit court and passed to another corporation, which operated the road from 1896 to 1902, apparently to the full satisfaction of everyone concerned. No

charge of fraud is made in the foreclosure proceedings nor in the organization of the new company which bought in the property, nor is there any circumstance connected with these transactions giving rise to even a suspicion of fraud. The defendants, then, are liable, if at all, not because of any fraud perpetrated, but for breach of contract, and it is familiar law that claims for breach of contract cannot be awarded priority over the bondholders of a railroad company, nor do they become an enforceable claim against a corporation which succeeds to another on foreclosure proceedings. In *Austin v. Tecumseh Nat. Bank*, 49 Neb. 412, this court said:

"In order to render a newly organized corporation liable at common law for the debts of an established corporation or firm to whose business and property it has succeeded, it should, in the absence of a special agreement, affirmatively appear from the pleadings and proofs that the transaction in question is fraudulent as to creditors of the old corporation, or that the circumstances attending the creation of the new and its succession to the business and property of the old corporation are of such character as to warrant the finding that it is a mere continuation of the former."

In a note in the above case found in 59 Am. St. Rep. 543, 558, numerous cases are cited in support of the rule that a railroad corporation which succeeds to the property and rights of another railroad corporation through the medium of a sale upon a decree of foreclosure, or other judicial sale, is not answerable for the general debts of a corporation whose property and franchises are acquired.

It is claimed by the appellant that the state, in granting a franchise to the Omaha & Kansas City Railroad Company, extended the privilege which its charter conferred, upon the condition that the company, on its part, should faithfully perform all the public functions required of it by law, and that this required it to operate its road in competition with that of the Chicago, Burlington & Quincy Railway Company. Conceding this to be true, it is evident that an action for damages for breach of contract is

not an appropriate action to enforce such duty, and that the payment of damages would not tend in the least to that end.

There are other considerations which lead us to believe that the judgment of the district court should be affirmed. While the question was not argued, it is one of first impression that the plaintiff cannot sustain the action. It has not been damaged in its corporate capacity, or in any other way, so far as we can see from any matter alleged in the petition or offered in evidence. What interest has it in the alleged contract which entitles it to damages for a breach? It is true that the bonds were issued in the name of Lincoln township, but the electors of the township voted the bonds and the property owners have paid the same. What will be done with any money recovered by the plaintiff? To the credit of what fund will it be placed? Will the township itself become the absolute owner or will it be distributed among those from whom it was collected? Under what authority does the township prosecute this action for the taxpayers, the real parties in interest? What authority has it to distribute the fund and to whom shall distribution be made? Are the present owners of the land, who probably bought and fixed the price in contemplation of this tax, to receive it, or such portion of it as they have paid, or does the whole amount assessed against any particular tract belong to the owner at the time the aid was voted? Under what statute is it made the duty of the township to bring this action, or where, in our laws relating to municipalities, is authority found for a township to bring and maintain an action in which it has no direct interest? To us it seems quite plain that the owners of the property upon which the tax was levied, and who had paid the tax making up the fund, are the real parties in interest and the only ones who have any right to complain of a breach of the contract, if the representations which induced the voting of aid constitutes a contract in such a sense that a failure to observe its terms entitles the electors to complain and to maintain an action for damages. We

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incline to the belief that the demurrer to the petition should have been sustained.

We recommend an affirmance of the judgment.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion; the judgment of the district court is

AFFIRMED.

ANNA E. SHEPPERD ET AL., APPELLEES, v. BANKERS UNION
OF THE WORLD, APPELLANT.*

FILED JUNE 20, 1906. No. 14,386.

1. **Insurance: ASSESSMENTS.** The monthly assessments required from the members of a beneficial society may be increased, when it is found that such increase is necessary to meet the needs of its business honestly administered.
2. ———: ———. The constitution and by-laws of a beneficial society provided that on the death of a member the amount due on his certificate should be ascertained by deducting from its face value the monthly assessments from the death of the member to the expiration of the life expectancy of such member with 4 per cent. interest thereon. The constitution and by-laws were afterwards changed, increasing the monthly assessments to be collected, but providing that such increased assessments should be collected only from members thereafter joining, the old members to continue to pay at the old rate and on their death the increase over the old rate to be deducted from their certificate. *Held*, That the society had the right, in settling with the beneficiaries of a deceased member, to deduct from the certificate the difference between the rate of the monthly assessments in force when the certificate was issued and the increased rate provided by the amendment computed from the time when the new rate went into effect up to the date of the death of the member, but not for the remainder of the life expectancy of such deceased member.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JR., JUDGE. *Reversed with directions.*

*See opinion on rehearing, p. 90, *post*.

Weaver & Giller, for appellant.

Montgomery & Hall, contra.

DUFFIE, C.

This action was brought by the beneficiaries named in a certificate of insurance issued by the Bankers Union of the World to Mrs. Sarah B. Shepperd for \$1,000, of date March, 1902. During the life of Mrs. Shepperd she paid the monthly assessments provided by the by-laws of the society up to the time of her death. Section 7 of the constitution and by-laws of the society, relating to the payment of certificates on the death of a member, provides the following method of arriving at the amount due upon the certificate: "For the purpose of creating a reserve fund to guard against poor risks, protect healthy members, equalize the costs to all, and absolutely insure the perpetuity of the union, all insurance of the Banker's Union of the World will be adjusted and paid on the following plan: Should any member holding a policy die before having lived out his expectancy of life, based on his age at entry, according to the American experience table of mortality, there shall be deducted from the death benefit payable on such policy held by said member a sum equal to the amount of one payment (at the rate paid by the member) for each month of the unexpired period of such life expectancy with 4 per cent. on the unpaid balance of said sum." It is alleged in the answer that Mrs. Shepperd's life expectancy when the certificate was issued was 31 years. She died in October, 1903, and 29 years and 5 months prior to the expiration of her life expectancy. Under the method provided for computing the amount due upon the certificate under section 7 of the constitution above quoted, there would be deducted from the face value of the certificate the regular monthly payments for 29 years and 5 months, together with 4 per cent., and the remainder would be the amount due the beneficiaries. After this certificate was issued to Mrs. Shep-

perd and after the payment of a number of monthly assessments, the constitution and by-laws of the order were regularly amended so as to require the payment of a larger monthly assessment from members of all ages to be immediately collected from all members thereafter joining. As to the old members, the additional monthly assessment was not required to be paid in cash, but on the death of the member the additional amount was charged up against his certificate and deducted therefrom. Under this amendment the defendant claims the right to deduct from the face value of the certificate in suit the increased monthly assessments from the date of the amendment up to the time of the expiration of Mrs. Shepperd's life expectancy, the claim of the plaintiffs being that there should be deducted from the face value of the certificate an amount to be computed on the balance of her life expectancy at the rate in force when she joined the order. This, as we understand, makes a difference of about \$220.

It is insisted by the beneficiaries, and the authorities are quite uniform to the effect, that no action taken by the order which will decrease the amount of the certificate or the amount due thereon at the time of the death of the insured is permissible. In *Pokrefky v. Detroit Fireman's Fund Ass'n*, 121 Mich. 456, 80 N. W. 244, it is held that the by-laws existing at the time the deceased became a member were a part of his contract with the association, which could not be changed against his protest, by a by-law subsequently enacted so as to deny the right of his beneficiaries to the entire proceeds of the certificate levied at his death. In *Morton v. Supreme Council, Royal League*, 100 Mo. App. 76, 91, 73 S. W. 259, the supreme court of Missouri said:

"There are numerous well-considered opinions in which it is ruled that subsequent by-laws undertaking to reduce the amount to be paid in certain contingencies do not take effect on previous contracts, and that a stipulation to comply with future regulations means the member will comply with such as relate to his duties as a member, but

does mean that the society may interfere with the essential purpose of the contract, namely, the indemnity covenanted to be paid." To the same effect are, *Campbell v. American Benefit Club Fraternity*, 100 Mo. App. 249, 73 S. W. 342; *Pearson v. Knights Templar & Masons Indemnity Co.*, 114 Mo. App. 283, 89 S. W. 588; *Strauss v. Mutual Reserve F. L. Ass'n*, 128 N. Car. 465, 39 S. E. 55. In *Parish v. New York Produce Exchange*, 169 N. Y. 34, 61 N. E. 977, it is said:

"These cases, as we understand them, establish a principle, which we deem well supported in reason, that the power of a corporation such as this one to amend its by-laws is a power to regulate within reasonable bounds, not a power to destroy the contract rights of its members."

Langan v. Supreme Council A. L. H., 174 N. Y. 266, 66 N. E. 932, and *Weber v. Supreme Tent, K. M.*, 172 N. Y. 490, 65 N. E. 258, both New York cases, are to the same effect. Experience in the conduct of these beneficiary associations has demonstrated that the amount of the monthly assessments first agreed upon fails, in many cases to produce a sufficient income to provide for the death benefits of the members. From an examination of the authorities we incline to the belief that, where an honest conduct of the business demonstrates that the assessments levied and agreed to be paid by the members first joining are not sufficient to meet the obligations of the society, then in such cases the constitution and by-laws may be so amended as to require additional monthly assessments to be paid. In an extended brief prepared by Frank H. Bacon, the author of *Bacon on Benefit Societies and Life Insurance*, he presents strong legal and equitable reasons for such a rule. The increased assessment operates alike on all members of the society. Each member of the society is subject to the same burden and entitled to participate in its benefits, and those who do not care to assume the additional expense may abandon the society, having had the benefit of their insurance up to the date of the increased burden being imposed. The burden and the benefit are equally distributed. In

Reynolds v. Supreme Council, Royal Arcanum, 192 Mass. 150, 78 N. E. 129, the supreme court of Massachusetts upheld the right of the society to increase the assessment beyond the amount levied when the plaintiff became a member. The case is well considered and is the latest expression found on the subject.

In the case under consideration the society said to its old members: We will not require you to pay the additional assessment from month to month as in the case of new members, but will charge you up with the additional amount and deduct it from the face of your certificate at the date of death. This, we think, is such a reasonable amendment to the constitution and by-laws as the courts ought to sustain. Whether the increased assessment may be charged up against the certificate of a deceased member after death and to the end of the life expectancy of such member presents a different question. On the death of the member the contract of insurance matures. By the payment of assessments and compliance with the rules of the order the benefits of the contract then accrue to the beneficiaries in all its terms. To allow a deduction from the face value of the certificate greater than was contemplated when the contract was made would be to annul the contract in its most important phase. The amount to be paid as monthly assessments is a rule of the order which must be complied with by all the members, and if the amount is increased during the life of the member it is a change of rule or by-law to which he has assented on joining the association, and during his lifetime he is to be governed by that rule. To allow the face value of his certificate to be decreased by the amount of an increased assessment charged against him after death would, however, in our opinion, be an indirect method of avoiding the contract made when he joined the order and an indirect method of avoiding payment of the amount contracted to be paid upon the policy when it was issued. The contract evidenced by the certificate alone cannot be changed or

annulled by a change of the by-laws. *Hale v. Equitable Aid Union*, 168 Pa. St. 377, 31 Atl. 1066.

We recommend a reversal of the judgment and that the cause be remanded to the district court, with directions to enter a judgment in favor of the plaintiffs for the face value of the policy, less the amount of the increased assessments from the time when ordered to the death of the insured, and less the original assessments contracted to be paid from the death of the insured to the expiration of her life expectancy.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded to the district court, with directions to enter a judgment in favor of the plaintiffs for the face value of the policy, less the amount of the increased assessments from the time when ordered to the death of the insured, and less the original assessments contracted to be paid from the death of insured to the expiration of her life expectancy.

JUDGMENT ACCORDINGLY.

The following opinion on motion to modify opinion was filed February 8, 1907. *Affirmed on condition:*

JACKSON, C.

The judgment was for the plaintiff and is for \$11.10 in excess of the amount which the plaintiff was entitled to recover under the rule announced in our opinion. The plaintiff has filed a motion to be allowed to remit that sum, and that thereupon the judgment of reversal be vacated, and that the judgment be affirmed, less the remittitur.

It is recommended that the judgment of reversal be vacated, that a remittitur be authorized, and upon such remittitur being entered that the judgment of the district court be affirmed for the sum of \$743.13.

By the Court: For the reasons stated above, the motion to modify the opinion is sustained and judgment of reversal vacated. Ordered that the plaintiff be allowed to enter a remittitur of \$11.10 from the judgment within thirty days, and if such remittitur is filed the judgment of the district court is affirmed for \$743.13, otherwise the judgment is reversed and the cause remanded.

JUDGMENT ACCORDINGLY.

ANNA BARBER, APPELLEE, V. VILLAGE OF FRANKLIN,
APPELLANT.

FILED JUNE 20, 1906. No. 14,402.

Cities: DETACHING TERRITORY. The fact that the owner of unplatted land, used exclusively for agricultural purposes for some years, tacitly submitted to its inclusion in the incorporated limits of a town does not estop him from proceeding under the statute to have it disconnected therefrom.

APPEAL from the district court for Franklin county:
ED L. ADAMS, JUDGE. *Affirmed.*

H. Whitmore, for appellant.

Flansburg & Williams, contra.

DUFFIE, C.

Anna Barber, in her petition, states that she is the owner of fractional lots 4, 5, 6 & 7 of section 6, township 1, range 14 west of the sixth P. M.; that said premises are used entirely for agricultural purposes, and are now, and for several years last past have been, alfalfa meadow; that these several tracts are included in the corporate limits of the village of Franklin, but are not in anywise benefited by said incorporation and should not properly be included in

the limits of the village; that they are not used for village purposes, and have never been platted or subdivided as village lots, blocks or tracts. She asks that they may be detached from the village of Franklin and disconnected therefrom. The village filed answer, alleging that it was incorporated in July, 1883, and that the tracts described in plaintiff's petition were included within its corporate limits, and that since that date the village has exercised corporate powers and functions over said land; that plaintiff was a resident of the village at the time of its incorporation, knew that her lands were incorporated and knew that her lands were included in the corporation. It is further alleged that the lands are mostly smooth, level lands and adjoin the platted part of the village, except that a railroad right of way lies between about one-half of plaintiff's lands and the platted part of the village; admits that the land described in the petition is yet unoccupied as residence land, is unplatted and being used for agricultural purposes. The case was submitted to the court upon the petition and answer, and judgment entered as prayed in plaintiff's petition. The village of Franklin asks us to review the judgment upon petition in error.

It is insisted that, having tacitly submitted to the inclusion of these lands within the incorporation, plaintiff cannot at this time object that they were improperly included or ask that such lands be now disconnected from the village. *McClay v. City of Lincoln*, 32 Neb. 412, and *South Platte Land Co. v. Buffalo County*, 15 Neb. 605, are authorities in support of the contention that, where one tacitly consents that his land may be included within an incorporated town and takes no action to disaffirm for some years thereafter, he has no standing in court to ask that the lands be disconnected. We do not think that these cases go to the extent claimed. In each of these cases an injunction was sought against the imposition of municipal taxes upon lands included within the corporate limits, upon the ground that they were agricultural lands and were improperly included in the corporation. If we understand

the opinions, it is held merely that the court, on an application for an injunction against a collection of municipal taxes, will not examine the validity of the corporation or the right to include within the corporate limits lands claimed to have been improperly included. This would be attacking the validity of the corporation in a collateral proceeding, and is not allowable. The plaintiff below is proceeding under our statute to have her lands disconnected. This is a right conferred by statute and, while the case is triable as a suit in equity, no equitable defense has been interposed to the relief which she is asking. It is not shown that any indebtedness has been incurred and is still outstanding against the village upon the strength of these lands being subject to taxation to bear its proportion of that expense. It is not alleged that the lands have been in anywise benefited by being included in the corporation or that corporate improvements have been extended over them. The fact that the party has submitted for some years to municipal taxation from which she was in nowise benefited is not an argument in favor of longer imposing upon her the burden of municipal taxes.

We think the district court was right in disconnecting her lands and relieving them from the burden of municipal taxation, and recommend an affirmance of the judgment.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FRANK R. WILD, GUARDIAN, APPELLEE, v. STORZ BREWING
COMPANY, APPELLANT.

FILED JUNE 20, 1906. No. 14,405.

Deed as Mortgage: DOWER. B. and wife conveyed certain real estate to H. and N. by warranty deed as security for a debt which was fully paid prior to the decease of the husband. No reconveyance was ever had, and by certain mesne conveyances made by N. and the heirs of H. the title finally vested in the defendant, who had notice that the conveyance to H. and N. was made as security only, and was not intended to be an unconditional conveyance. *Held*, That the widow of B. was entitled to dower in such real estate.

APPEAL from the district court for Saline county: LES-
LIE G. HURD, JUDGE. *Decree modified.*

Hamilton & Maxwell and J. H. Grimm, for appellant.

J. H. Wild, W. G. Hastings and W. S. McGintie, contra.

DUFFIE, C.

In November, 1887, Charles B. Bailey and Lydia, his wife, conveyed two lots in the town of DeWitt to Alexander Hawes and Wm. R. Nelson. The conveyance was by warranty deed, but was in fact a mortgage made to secure Hawes and Nelson against liability upon a note on which they had become security for Bailey. Sometime after the conveyance Mrs. Bailey was committed to the insane asylum, and Frank R. Wild is her guardian. In due time Bailey paid the note upon which Hawes and Nelson were sureties, and thereafter, and apparently at the request of Bailey, Nelson conveyed his interest in the lots to George A. Hunt, and by several mesne conveyances the title held by Nelson finally vested in Nicholas Aebig by deed of March 2, 1901. In the meantime Hawes had deceased and Aebig commenced an action in the district court for Saline county against his heirs, alleging in the petition that the deed from Bailey and wife to Hawes and Nelson was made as security

only; that the debt which it was made to secure had been fully paid and the mortgage thereby satisfied. A decree to this effect was entered in the district court on May 9, 1901, and the defendants in the action were directed to convey to the plaintiff the lots in question, and in default of such conveyance the decree was to stand in lieu thereof. Aebig and wife conveyed the lots to the Storz Brewing Company by warranty deed of date November 5, 1901, and on or about that date the company took possession of the lots and have remained in possession to the present time. Charles B. Bailey departed this life November 11, 1901, and this action was commenced in April, 1904, to establish the widow's right of dower in the lots and to recover from the Storz Brewing Company damages for detaining the same. Eugene F. Bailey filed a cross-petition in the action, claiming to be the owner in fee of said lots as the only heir of his deceased father. The district court dismissed his cross-petition, and, as we think the evidence fully sustains the decree in that respect, this phase of the case will not be further noticed. A decree was entered finding Lydia Bailey, the widow of Charles B. Bailey, entitled to dower in the lots, and his widow is not, therefore, entitled to a ant, the Storz Brewing Company, in the sum of \$276.66 as damages for detaining the same.

The principal questions discussed in the briefs of the parties are the right of the widow to dower and the amount thereof. It is insisted by the appellant that Lydia Bailey, by joining with her husband in the deeds conveying the lots to Hawes and Nelson, barred her dower interest. It is urged that Charles B. Bailey was never, subsequent to the date of these deeds, seized of "an estate of inheritance" in the lots, and his widow is not, therefore, entitled to a dower interest. *Crawl v. Harrington*, 33 Neb. 107, and *Hall v. Crabb*, 56 Neb. 392, are relied upon as authorities in support of this claim. In each of the cited cases the land in which dower is claimed was held by the deceased spouse under executory contracts of purchase, and this court held that such contracts did not vest in the holder a

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freehold estate out of which dower might be claimed. In each of these cases the deceased spouse never possessed the legal title. They never held more than an equitable interest in the land in which dower was claimed, while in the case under consideration the husband was the owner in fee, and, being so, seized of the legal estate, pledged it as security. It is true that this pledge was effected by means of an absolute conveyance, but to one acquainted with the facts, and having knowledge that the conveyance was intended as a mortgage, and not as an unconditional transfer of the title, the form of the instrument creating the pledge is immaterial.

Sections 3-6, ch. 23, Comp. St. 1905, clearly provide for dower to the widow in lands owned by the husband in fee, but incumbered by mortgage. If, instead of conveying by deed by way of security, Bailey had executed an ordinary mortgage upon these lots to Hawes and Nelson, no one would, under our statute, question the widow's right of dower in the equity. On principle we cannot see how any different rule would apply to a purchaser of the lots in question, who had notice that the conveyance to Hawes and Nelson was by way of security, and not intended to operate as an unconditional conveyance of the title to them. That the Storz Brewing Company had knowledge that this conveyance was by way of security only is abundantly shown by the evidence, the abstract of title furnished prior to its purchase containing the proceedings had in the district court for Saline county in the case brought by Aebig to have such conveyance declared a mortgage. Relating to the amount of damages allowed for detaining the dower of the widow, section 24, ch. 23, Comp. St. 1905, is as follows: "Such damages shall be one-third part of the annual value of the mesne profits of the lands in which she shall so recover her dower, to be estimated in a suit against the heirs of her husband from the time of his death, and in suits against other persons, from the time of her demanding her dower of such persons." There is no competent evidence in the record that demand of dower was made upon the

Storz Brewing Company prior to the commencement of this action. It is true that one of the witnesses testifies to a letter written to the company sometime previous to the commencement of the action, but the letter was not produced and a copy thereof was improperly admitted in evidence over the objection of the defendant.

We recommend that the decree of the district court be modified so as to allow damages to the plaintiff on account of the dower of his ward at the rate of \$20 quarterly from the commencement of the action, and that in all other respects the decree stand affirmed.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is modified so as to allow damages to the plaintiff on account of the dower of his ward at the rate of \$20 quarterly from the commencement of the action, and that in all other respects the decree stand affirmed.

DECREE MODIFIED.

FRANK D. TAYLOR, APPELLEE, v. J. E. HOVER, APPELLANT.

FILED JUNE 20, 1906. No. 14,411.

Instructions defining adverse possession examined, and *held* not prejudicial to the defendant.

APPEAL from the district court for Sarpy county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

Charles L. Hover, for appellant.

Charles A. Goss and *James Hassett*, *contra*.

DUFFIE, C.

Frank D. Taylor commenced this action against J. E. Hover to recover possession of tax lot G, in section 21,

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township 14, of range 13 east of the sixth P. M. in Sarpy county. His petition alleges a legal estate in the above described premises and that he is entitled to the possession thereof. The answer was a general denial. A verdict was returned in favor of the plaintiff, upon which judgment was entered giving him possession of the premises, and the defendant has appealed.

The defendant claimed title by adverse possession. Relating to this defense the court instructed the jury as follows: "It is incumbent upon the defendant, before he can recover, to satisfy you by a preponderance of the evidence that he and those under whom he claims have, for a period of ten years before the commencement of this action, been in the open, actual, continuous, notorious, exclusive and hostile possession of the land in controversy, claiming the same as their own, as against the true owner and all other parties." In another instruction the court defined "hostile" as follows: "The word 'hostile,' when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill will or that he is an enemy of the person holding the legal title, but means an occupant who holds and is in possession, claiming to hold the land against all other claimants." The only error relied on is the use of the word "hostile" in the first instruction above quoted. This word has usually been used by the courts to define a possession adverse in its nature. In *Ballard v. Hansen*, 33 Neb. 864, the use of the word was criticised as applied to an adverse possession; but in *Hoffine v. Ewings*, 60 Neb. 729, its use, with the explanation contained in other instructions, was held to be without prejudice to the party claiming adversely to the legal title. In the case at bar the undisputed evidence discloses that Hover entered into possession of the land in dispute under a deed from one Preston. This deed bears date March 4, 1902. Preston rented the land from the owner of the legal title for the year 1901. He entered as tenant of the legal owner. He continued in possession after the expiration of his lease, and there is nothing to

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show that his possession was based on any claim of right, title or ownership. His possession being taken under a lease from the legal owner, the presumption is that it continued in subordination to the legal title in the absence of evidence showing that he claimed a greater estate. The record is silent, or practically so, of any acts on the part of Preston tending to show that he asserted title as against the true owner, or claimed ownership in himself prior to his conveyance to the defendant and appellant. The instructions of the court were not prejudicial to the defendant, and the verdict of the jury is clearly supported by the evidence.

We recommend an affirmance of the judgment.

ALBERT and JACKSON, CO., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

**LINCOLN COUNTY V. CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY.**

FILED JUNE 20, 1906. No. 14,269.

1. **Taxation: ILLEGAL LEVY.** Where a county board has levied the full amount of tax allowed by law for a county general fund, and also designedly levies a larger amount of bridge tax than is necessary for use in that fund, and immediately transfers a large part thereof to said general fund, the tax so unnecessarily levied and transferred is levied for an illegal and unauthorized purpose and is void. *Chicago, B. & Q. R. Co. v. Lincoln County*, 66 Neb. 228.
2. —: **PAYMENT UNDER PROTEST: RECOVERY.** In such case, in a suit brought to recover the illegal tax paid under protest, it devolves upon the county to point out what portion, if any, of the tax was levied for a legal and authorized purpose, and upon its failure to do so the plaintiff is entitled to a verdict for the full amount paid.
3. —: **LEVY.** It is the duty of a county to levy, within certain

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limits, the taxes required for certain purposes each year, and the fact that its funds had been improvidently expended or illegally diverted in the past does not relieve it of such duty.

4. **Review: EVIDENCE.** Where evidence necessary to sustain a verdict has been erroneously excluded upon a general objection, the party at whose instance the evidence was excluded will not be heard to complain that the verdict, for want of such evidence, is not sufficiently sustained.

ERROR to the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Affirmed.*

L. E. Roach, A. Muldoon and J. G. Beeler, for plaintiff in error.

J. W. Deweese, Frank E. Bishop and W. T. Wilcox, contra.

ALBERT, C.

The plaintiff railroad company, the defendant in error in this court, filed its petition against Lincoln county, purporting to state two causes of action. The first is out of the way and requires no further mention. The second is based on section 144, art. I, ch. 77 of the revenue act of 1897, corresponding to section 162 of the same article and chapter of the present revenue law, providing for the recovery of taxes levied for an illegal and unauthorized purpose, when paid under protest. The allegations constituting the second cause of action are, in substance, that in the year 1897 the county board levied a tax of nine mills on the dollar for county purposes, and two mills on the dollar for bridge purposes, and that the tax upon the property of the plaintiff for bridge purposes amounted to the sum of \$312.14; that the bridge levy for 1897, as well as several years prior thereto, was designedly made higher than was necessary for the purpose of transferring the surplus arising therefrom to the general county fund, and that \$1,850 of the bridge levy for 1897 was in fact transferred to the general fund. A general demurrer to this cause of action was sustained, but the judgment thereon

was reversed, this court holding that, "where a county board has levied the full amount of taxes allowed by law for a county general fund, and also designedly levies a larger amount of bridge tax than is necessary for use in that fund, and immediately transfers a large part thereof to said general fund, the tax so unnecessarily levied and transferred is levied for an illegal and unauthorized purpose and is void." *Chicago, B. & Q. R. Co. v. Lincoln County*, 66 Neb. 228. After the cause was remanded to the district court, the issues were made up and a trial had to a jury.

There is no conflict in the evidence. It shows conclusively that from 1894 to 1897, inclusive, the county levied each year a tax of nine mills on the dollar for general purposes, which is the maximum allowed therefor by the law then in force, as well as by that in force at the present time. Section 77, art. I, ch. 77, Comp. St. 1897; sec. 136, art. I, ch. 77, Comp. St. 1905. There was also a levy each year for bridge purposes, and a transfer of large sums from the bridge to the general fund of the county. The county board in January of each year made an estimate of expenses in accordance with the provisions of subdivision 6, sec. 25, art. I, ch. 18, Comp. St. The following shows the official estimate for bridges each of those years, the amount levied therefor, the amount transferred from the bridge to the general fund, and the date of each estimate, levy and transfer:

ESTIMATE.

1894	Jan. 12	\$11,000.00
1895	Jan. 31	12,000.00
1896	Jan. 30	12,000.00
1897	Jan. 14	10,000.00

LEVIES.

1894	July 10	\$7,796.96
1895	June 29	9,639.79
1896	July 7	8,811.08
1897	July 7	5,101.89

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TRANSFERS.

1894	Jan.	3.....	\$2,000.00
	Jan.	18.....	1,000.00
	Mar.	29.....	2,500.00
	Dec.	4.....	2,000.00
	Dec.	21.....	500.00
1895	Feb.	14.....	1,000.00
	Apr.	9.....	1,000.00
	Apr.	12.....	1,000.00
1896	Oct.	28.....	1,000.00
	Feb.	21.....	2,500.00
	Aug.	26.....	350.00
	Oct.	9.....	400.00
1897	Feb.	20.....	1,850.00

In addition to the foregoing, the plaintiff offered to show that the estimate for bridge purposes for the year 1898 was \$8,000; that in June, 1898, the county board made a levy of nine mills on the dollar for general purposes, and one mill for bridges; that on the 7th day of July, thereafter, the county board transferred \$3,000 from the bridge to the general fund. This evidence was excluded at the defendant's instance. The court directed a verdict for the plaintiff for the full amount of the bridge tax assessed against its property for 1897. The defendant county now appeals.

Taking into account the fact that the board each year levied the maximum allowed by law for general county purposes, the amount levied each year for bridge purposes, the large excess thereof transferred each year to the general fund, the dates at which the transfers were made, with reference to the dates of the estimates, and the dates of the levies, there is but one reasonable inference to be drawn from the record, and that is that each year prior to 1897 the board designedly made an excessive levy for bridge purposes, with a view to transferring a portion of the fund realized therefrom to the general fund, and thereby to evade the law limiting the levy for general purposes to nine mills on the dollar valuation. In other words, we think the record shows conclusively that, while

a levy was made ostensibly for bridge purposes each of those years, a portion thereof was in fact intended for general purposes, and the levies for those years would clearly come within the rule stated on the former appeal and hereinbefore quoted. But we are dealing with the bridge levy of 1897, which the trial court in effect found was entirely illegal and void. The question now presented is whether the evidence justifies that finding. It will be recalled that no evidence was received of the transfer of any portion of the amount realized from the bridge levy of 1897 to the general fund. All transfers of bridge funds shown by the evidence were from previous levies, the latest being \$1,850, which was made on the 20th day of February, 1897, some four months before the levy in question. The record presented on the former appeal showed that this transfer was from the levy of 1897, but the evidence now shows that it was from a previous levy.

We do not think such transfers, in and of themselves, vitiate the levy of 1897. The law makes it the duty of the county board to levy the necessary taxes for general purposes each year. The fact that the board has been improvident, or has made an illegal use of funds in the past, does not relieve it of this duty. When it meets to levy taxes, the question is not what has become of revenues collected in the past, but what amount of revenue is required for the different purposes for the current year. The necessities may be urgent, and they are none the less so because funds which should be available to meet such necessities have been illegally expended or diverted. To hold otherwise would be to place it within the power of the county board to emasculate the county, and render it impotent to discharge its functions as a political subdivision.

We think, however, the court should have received the evidence showing the transfer of the \$3,000 from the bridge to the general fund on the 7th day of July, 1898. That transfer was of a portion at least of a balance on hand after meeting the expenses chargeable to the bridge fund

to that date. It must have been derived from the levy of 1897, or previous levies, because the transfer was made on the date of the levy of 1898, and the difference in the fund could have been realized therefrom. From the fact that the county had a remainder of at least \$3,000 of the bridge fund at the date of the levy for 1898, taken in connection with the evidence showing the previous transactions of the board, the only reasonable inference is that the bridge levy for 1897 was designedly made excessive, for the purpose of transferring a portion at least to the general fund, for which the maximum amount allowed by law was levied at the same time. In other words, had such evidence been received, the only reasonable inference from the entire record would be that one purpose of the levy in question was to evade the law limiting the amount to be levied for general purposes in any year to nine mills on the dollar valuation. Had the board proceeded directly to levy a tax for general purposes in excess of the amount allowed by law, the tax to the extent of the excess would be held to have been levied for an illegal purpose. *Dakota County v. Chicago, St. P., M. & O. R. Co.*, 63 Neb. 405, and cases there cited. That it proceeded by indirection, and made the levy ostensibly for bridge purposes, does not better its position. The evidence necessary to make out plaintiff's case and that the bridge levy for 1897 was designedly excessive, and made with a view to transfer a portion thereof to the general fund, was excluded on a general objection interposed by the defendant. Consequently, for the purpose of testing the sufficiency of the evidence to sustain the verdict, that evidence should be treated precisely as though it had been received, because a party will not be heard to complain of a judgment against him because of the want of evidence which was excluded at his instance. *Sours v. Great Northern R. Co.*, 81 Minn. 337; *Missouri, K. & T. R. Co. v. Elliott*, 102 Fed. 96, 42 C. C. A. 188; *Jobbins v. Gray*, 34 Ill. App. 208; *Clafin v. Farmers & Citizens Bank*, 24 How. Pr. (N. Y.) 1.

It is true that, even had an excessive levy been expressly made for general purposes, it would have been illegal only to the extent of the excess. It is also true that, even considering the evidence excluded at the defendant's instance as part of the evidence in the cause, it does not show the exact portion of the bridge levy for 1897 which the board intended to divert to the general fund. But we think the defendant is in a position somewhat analogous to that of one who wrongfully intermingles his goods with those of another, and the rule in such case is that all the inconvenience of the confusion is thrown on the party who produced it, and, generally, it is for him to distinguish his own property or to lose it. Here, if any portion of the bridge tax for 1897 was actually required for bridge purposes, it was included with that which was in fact levied for the illegal purpose of transferring it to the general fund. The defendant or its agents were in possession of the facts, and it was for the defendant to show what portion of the levy, if any, was legal, and having failed to do so, the plaintiff was entitled to a finding that the entire bridge tax for 1897 was levied for an illegal purpose.

It is recommended that the judgment be affirmed.

JACKSON, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

W. T. HAUPTMAN V. ALBERT PIKE.

FILED JUNE 20, 1906. No. 14,299.

1. **Sales: FALSE REPRESENTATIONS.** Where the defense is that the defendant had been induced to buy certain personal property by the false and fraudulent representations of the plaintiff, his vendor, the fact that such representations were made two days before the

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sale was consummated would not of itself justify the exclusion of evidence thereof.

2. ———: ———. Ordinarily, in such case, the defendant is entitled to trace the negotiations to their inception, where the evidence thereof tends to establish such defense.

ERROR to the district court for Saline county: **LESLIE G. HURD, JUDGE.** *Reversed.*

F. W. Bartos and Hall, Woods & Pound, for plaintiff in error.

A. S. Sands and Hazlett & Jack, contra.

ALBERT, C.

Suit was brought by the payee against the maker of a promissory note to recover the balance due thereon. The answer admits the execution and delivery of the note. As a defense thereto it is alleged in the answer that the consideration therefor was a certain team of horses sold and delivered by the plaintiff to the defendant; that at and prior to the sale and delivery thereof the plaintiff, to induce the defendant to buy the said team, falsely and fraudulently represented that the said horses, and each of them, were "perfectly sound, gentle and without blemish"; that the defendant bought the said team, and gave the note in suit, relying upon said representations and believing the same to be true; that the said representations were false, in that one of the horses at the time was lame, spavined, vicious, and dangerous to handle; but by reason of said false representations the defendant has sustained damages in excess of the balance due on the note. The reply is a general denial of the facts pleaded as an affirmative defense. The jury found against the defendant on his affirmative defense, and returned a verdict for the full amount of the balance due on the note. Judgment went accordingly. The defendant brings error.

That the note was given for the consideration stated in the answer is conceded. That one of the horses was lame

and vicious is a fact which the jury could well have found from the evidence. The nature of the representations made by the plaintiff with respect to the team and whether the defendant relied upon them are among the principal questions litigated. The defendant testified in his own behalf. It appears from his testimony that about two days before he bought the team the plaintiff called upon him, and asked him if he wanted to buy a team; that he answered in the affirmative, whereupon the plaintiff informed him that he had a team to sell. After testifying to those facts, the defendant was interrogated as to the representations made by the plaintiff at that time. The answer was excluded, whereupon the defendant made the following offer: "Defendant offers to prove by this witness that on the last day of February, at defendant's residence in Saline county, the plaintiff represented to this defendant that he had a bay team of horses to sell, or a horse and a mare, that were sound, free from blemishes, and free from vice; that in pursuance of said representations the defendant two days afterwards went over to the plaintiff's place in the evening to buy said team, and did buy it on the strength of the representations made by the plaintiff, not only at the time he bought them, but representations made at his house before that time." To the foregoing offer the plaintiff interposed this objection: "Plaintiff objects to the offer, as far as the same relates to any conversation or conversations had prior to the purchase and sale of the team mentioned, and to the conversation or purported conversation had two days before the transaction at the house or home of the defendant, as incompetent, irrelevant and immaterial." The objection was sustained and the ruling in that behalf is now assigned as error. It would seem that the court excluded the evidence on the theory that representations made two days before the sale took place were too remote. That theory is not tenable. The gist of the defense is that the defendant was induced to buy the team by certain false and fraudulent representations made by the plaintiff. Of

necessity, representations which are the inducement, or part of the inducement, to a sale must precede it; generally they are a part of the negotiations leading up to it. Such negotiations may cover a longer or shorter period, but, in either case, it is competent for the party charging fraud to trace them to their inception, if necessary, to prove the charge. See *Sellar v. Clelland*, 2 Colo. 532; *Kost v. Bender*, 25 Mich. 515; 14 Am. & Eng. Ency. Law (2d ed.), 198. The plaintiff contends, however, that he admitted the representations included in the offer while testifying in his own behalf. The evidence pointed to sustain that contention does not do so. It shows that he represented the horses to be sound, "as far as he knew." That is essentially different from the unqualified representations which the defendant offered to show. It is also claimed that the defendant was afterwards permitted to testify to matters covered by his offer. A careful reading of his testimony satisfies us that such is not the case, and that both he and counsel regarded the ruling of the court upon the offer as final, and were governed by it during the after progress of the trial.

Complaint is also made because the court sustained a motion to strike two clauses from the answer on the ground that such portions tendered other and different issues than those litigated in the county court where the case was first brought and tried. As to one clause, no complaint was made in the motion for a new trial that it was thus stricken; as to the other, it is impossible to ascertain from the record whether it was material in the connection in which it was used, because the connection in which it stood is not shown. For these reasons, we cannot determine the correctness of the ruling of the trial court on this motion. Other questions are argued, but they are not of a character requiring notice at this time.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

PATRICK E. NEALON, APPELLEE, V. LYDIA MCGARGILL ET AL.,
APPELLEES; DELA F. MCINTYRE, INTERVENER, APPEL-
LANT.*

FILED JUNE 20, 1906. No. 14,383.

1. Evidence examined, and *held* sufficient to sustain the decree of the district court.
2. Error: REVIEW. Where the only parties affected by alleged errors in a decree are satisfied, others will not be heard to complain.

APPEAL from the district court for Greeley county:
JAMES N. PAUL, JUDGE. *Affirmed.*

W. F. Critchfield and *T. P. Lanigan*, for appellant.

Abbott & O'Malley, T. J. Doyle and *J. R. Swain*, *contra.*

ALBERT, C.

This suit was brought by Patrick E. Nealon against Lydia McGargill and William McGargill for the specific performance of a contract to convey certain real estate. Ellen Nealon and Dela F. McIntyre became parties by intervention. The following is the substance of the allegations of plaintiff's original petition: That on the 16th day of July, 1902, the defendant, Lydia McGargill, was the holder of the legal title to said premises, and that at said time she sold the same under an oral agreement to the plaintiff for the sum of \$1,000 cash and other valuable considerations, viz., \$300 cash to be paid to defendants for the use and benefit of Ellen Nealon, the mother of the plaintiff and of the defendant, Lydia McGargill, and the

*Rehearing allowed. See opinion, p. 115, *post*.

additional sum of \$100 per annum to be paid to the said defendant, Lydia McGargill, during the lifetime of the said Ellen Nealon, for the use and benefit of said Ellen Nealon, said annuity to be secured by a mortgage on the above described premises; that, upon payment of said sums of money and the securing of said annuity to said Ellen Nealon, defendant agreed to convey said premises to the plaintiff by a deed of general warranty, subject to a mortgage of \$1,000 which plaintiff agreed to assume and pay; and that at the time the said oral contract was so made the plaintiff had an equitable interest in said land, which interest was acquired as follows: In March, 1892, said land belonged to said Ellen Nealon, and at said time she orally agreed with plaintiff that if he would stay on said land and work it, and take care of and support her, later on she would deed said land to plaintiff, and, in pursuance of said agreement with said Ellen Nealon, the plaintiff worked said land from March, 1892, until the time of filing his petition herein, always relying upon said agreement; and that during said time he took care of the said Ellen Nealon and supported her, and made valuable improvements on the land and paid a mortgage on the same; that all of said labor was done and money expended with the distinct understanding with the said Ellen Nealon that said land was ultimately to become the property of the plaintiff; that the plaintiff, by reason of the agreement entered into with the defendant, Lydia McGargill, entered into possession of said premises, and has continued in possession of same, with the assent of the defendant, from that time until the the time of filing said petition; that there is still due the defendant on said contract the sum of \$71, and to the defendants for the use and benefit of Ellen Nealon the sum of \$300 and the mortgage on the said premises for the payment of \$100 per year during the lifetime of said Ellen Nealon; that the plaintiff has duly performed all of the conditions of the contract on his part, and now brings said sums of \$71 and \$300 and said mortgage into court and offers the same to the defend-

ants, and prays that they may be required to accept the same and convey the land. Afterwards the plaintiff filed an amendment to his said petition, in which he alleged that in 1894 the said Ellen Nealon agreed to convey said property to said plaintiff, and that in the year 1898, it was further verbally agreed between the plaintiff and the said Nealon that, in consideration of the services which plaintiff had then rendered in working upon and managing said farm, and the further agreement then and there made that the plaintiff should pay to the said Ellen Nealon \$600, when called upon so to do, for the use and benefit of said Lydia McGargill, and continue to support the said Ellen Nealon and provide her a home upon said premises, the said Ellen Nealon would convey the legal title to said premises to the said plaintiff. To the petition of the plaintiff and the amendment thereto the defendants, Lydia McGargill and William McGargill and intervener Ellen Nealon, all filed answers amounting in substance to general denials. The intervener, Dela F. McIntyre, filed an answer, denying the allegations of plaintiff's petition, and setting forth a written contract between himself and Lydia McGargill by the terms of which said Lydia McGargill had agreed to sell and convey the said premises to the said Dela F. McIntyre; that a cash payment had been made upon said contract and retained by said Lydia McGargill; that he was ready and willing to perform the terms of his contract and offered in court to do so. To the answer of Dela F. McIntyre, the plaintiff replied, denying generally all the allegations therein contained, and alleging that, at the time the alleged contract between said intervener and Lydia McGargill was made, the intervener had notice of plaintiff's rights in the premises.

The findings and decree of the court are, in substance, that the plaintiff, Patrick E. Nealon, was the owner in fee of said premises, and that the defendants, Lydia McGargill and William McGargill, and the intervener, Dela F. McIntyre, had no interest in said premises, and that the plaintiff, Patrick E. Nealon, provide and set apart com-

fortable and suitable apartments in the dwelling house upon said premises for the intervener, Ellen Nealon, and furnish to her proper and suitable maintenance and support during her lifetime, and, in the event the said Ellen Nealon refuses to live upon said premises and to make her home with the said Patrick E. Nealon, then the said Patrick E. Nealon should pay her the sum of \$200 per annum for each year during her lifetime, \$100 of said sum to be paid on the first day of September of each year, the same to be made a lien upon said premises, and, in case of default in said payment, the same to be enforced by filing a motion in this cause calling the attention of the court to the default in the payment of said sum, and citing the plaintiff to appear; and that the defendants, Lydia McGargill and William McGargill, and the intervener, Dela F. McIntyre, pay the costs of the suit. The defendants and interveners appealed from the decree. Subsequently, however, the intervener, Ellen Nealon, entered into an agreement in writing with the plaintiff, which contemplates the carrying out the terms of the decree, and in which she asks that the decree, so far as it concerns her, be affirmed. The controversy at present, therefore, is between the plaintiff and the intervener, McIntyre, and the defendants, Lydia and William McGargill, the latter having no interest, however, save as the husband of his codefendant.

Ellen Nealon, one of the interveners, is the mother of the plaintiff and the defendant, Lydia McGargill, and the common source of title of all the claimants herein. She conveyed the legal title to the land in controversy to the defendant, Lydia, early in the summer of 1902. From the latter's own testimony it is clear that by such conveyance she took the bare legal title, her mother retaining whatever beneficial interest she had in the premises at that time. The contract under which the intervener McIntyre claims an interest in the land was entered into between him and the defendants, Lydia McGargill and her husband, more than a year afterwards. The immediate object of the con-

veyance from the mother to her daughter, Lydia, was to effect a loan on the property, the mother being of an age that made it difficult to obtain a loan in her own name. At the time of the conveyance the plaintiff was, and for many years had been, in possession of the land, claiming to be the owner thereof by virtue of certain agreements between him and his mother. After the conveyance by the mother to Lydia, the latter and her husband negotiated a loan of \$1,000 on the land, executing the necessary papers and receiving a draft for the amount of the loan. Before the draft was cashed the plaintiff notified the loan company of his claim to the land, and the company recalled the draft and refused to make the loan, unless the plaintiff would join in the mortgage and execute a relinquishment of his claim to the land, which he finally did. He testified that he executed the mortgage and relinquishment in pursuance of the following agreement between himself and his mother and sister, Lydia, the principal defendant; that he should execute said mortgage, assume and pay the debt thereby secured, allow the proceeds of the loan to be paid to his sister, Lydia, for the benefit of herself and mother, pay the mother \$300 cash, and \$100 each year so long as she lived, payment thereof to be secured by mortgage on the land, and that, in consideration thereof, the title in fee should be conveyed to him. His testimony is strongly corroborated by other witnesses, one of whom is the agent through whom the \$1,000 loan was negotiated. This witness testified to a conversation had with the defendant, Lydia, at about the time the loan was made, in which she told him of an agreement she had made with the plaintiff, and stated the terms substantially as they were given by the plaintiff on the witness stand. Another witness testified to a similar conversation had with the defendant, Lydia, at about the same time, in which she again stated the terms of her agreement with the plaintiff. This defendant does not unequivocally deny this conversation, but when asked with respect to it said: "I do not believe it was

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said in those words, quite." The testimony satisfies us that the parties actually entered into this agreement.

The plaintiff joined in the loan, and to meet the terms of the loan company executed a relinquishment of his interest in the land, but retained possession. The proceeds of the loan were paid to the defendant, Lydia, save \$71 which was paid out for taxes on the land. Lydia and her mother then refused to carry out their part of the contract. When the suit was brought the plaintiff paid \$371 into court for the defendants, for the use of his mother, that being the amount of the cash payment required by the terms of the contract and the \$71 paid out of the loan for taxes. The contract of July, 1902, was an adjustment of the conflicting claims of the parties thereto to the land. Each of these claims appears to have been put forth in good faith, and none at the time was entirely free from doubt. The contract therefore was founded upon a sufficient consideration. It is binding upon the mother who, as we have seen, has signified her willingness to abide by the decree. *A fortiori* it is binding on the defendant Lydia and her husband, because at the time they had no interest in the land, save that Lydia held the legal title in trust for her mother. It is also binding upon the intervener, McIntyre, because the contract under which he claims was made with Lydia and her husband about a year after plaintiff's contract was made. At that time plaintiff was in possession claiming under his contract. In addition to the notice imparted by such possession, the evidence sufficiently shows that before McIntyre's contract was made he was fully informed of plaintiff's contract by the plaintiff himself, so that he cannot be regarded as an innocent purchaser, nor as standing in any better position than his grantor. It may be said, in passing, that he has invested only \$200 in the land. In view of the evidence, it seems to us a finding against the defendants and the intervener, McIntyre, was inevitable. The evidence against the other intervener, the mother, is somewhat weaker, as she would not be bound, perhaps, by the admissions of the defendant,

Lydia. But, as we have seen, she is satisfied with the decree.

It is contended, however, that the contract enforced by the decree is not that pleaded by the plaintiff. The plaintiff has paid his cash payment of \$300 and the \$71 paid out of the \$1,000 loan for taxes into court. He has fully performed his part of the contract of July, 1902, so far as he owes any performance thereof to the defendant. The portion unperformed is for the exclusive benefit of the mother. The decree is more liberal to her than the contract. In that respect alone does it depart from the terms of the contract. Both she and the plaintiff are satisfied with it, and its variance from the terms of the contract does not concern the other parties.

It is recommended that the decree of the district court be affirmed.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

The following opinion on rehearing was filed November 10, 1906. *Former judgment modified and cause remanded with directions:*

DUFFIE, C.

Our attention has been called to the fact, not noticed in the briefs filed in this case, that the appellant paid \$200 on his contract of purchase which has been set aside by the court. Plaintiff, on commencing this action, paid into court the sum of \$371 which has not been disposed of by the decree. It is quite apparent that Lydia McGargill and Ellen Nealon have had the benefit of the payment made upon this land by the intervener and appellant. Equity requires the repayment of this money upon the cancellation of his contract of purchase, and the money paid into

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court for the benefit of the defendants should be used for that purpose. The defendants and intervener were jointly taxed with the payment of all the costs. Under our statute an intervener who fails in his action can be charged only with the costs made by his intervention. Code, sec. 50b. The decree of the district court and the judgment of this court heretofore entered will be so modified as to require the payment to the appellant of \$200 from the money deposited in court by the plaintiff, and to direct the district court to ascertain the amount of costs made by the intervention of the appellant and to tax him with the payment of such costs, and for this purpose the case will be remanded to the district court.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court and the judgment of this court heretofore entered are modified and the cause is remanded to the district court, with directions to require the payment to the appellant of \$200 from the money deposited in court by the plaintiff, and, further, to ascertain the amount of costs made by the intervention of the appellant and to tax him with the payment of such costs.

JUDGMENT ACCORDINGLY.

ADONIS D. HOWARD ET AL., APPELLEES, V. OMAHA WHOLESALE GROCERY COMPANY, APPELLANT.

FILED JUNE 20, 1906. No. 14,387.

Evidence examined, and held sufficient to sustain a finding of agency.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JR., JUDGE. *Affirmed.*

A. S. Churchill, for appellant.

Stillman & Price, contra.

ALBERT, C.

At the time of the transaction which gave rise to this suit the plaintiffs were selling merchandise at retail in Montana, and the defendant, a corporation having its principal place of business in Omaha, was selling groceries at wholesale. On the 3d day of March, 1903, one A. A. Sheard called upon the plaintiffs, representing himself to be the defendant's agent, soliciting orders in its behalf. The plaintiffs dealing with him in his capacity as such agent ordered a bill of goods aggregating \$374.79. According to the terms of the order \$96.32 was paid on the bill by the plaintiffs to Sheard when the order was given; the remainder was to be paid upon the delivery of the goods to the plaintiffs in Montana. The goods were never delivered, and the plaintiffs brought suit to recover the \$96.32 paid on the purchase price. The suit was defended on the theory that Sheard was not the agent of the defendant and had no authority to bind it in the premises. A jury was waived, and the court found for the plaintiffs and gave judgment accordingly. The defendant appeals.

The sole question presented by the record is whether there is sufficient evidence to sustain a finding that Sheard was the defendant's agent, authorized to take the order in question and receive the cash payment thereon. It appears from the evidence that at the time the order was given Sheard was actively soliciting orders for the defendant in Montana, and had taken similar orders from other parties, receiving cash payments thereon. A suspicion arose that he had no authority to take orders and receive payments thereon on behalf of defendants, and on the 7th day of March, 1903, four days after the transaction in question, he was arrested on the complaint of a third party in Montana for obtaining money under false pretenses concerning his relations with the defendant. While he was in the custody of the sheriff in Montana, in order to show that the charge was unfounded, he telegraphed the defendant, stating that he was in the custody of the

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sheriff, and asking: "Will you fill all orders that I collect 25 per cent. on?" The defendant through its manager in Omaha wired this answer: "We will fill all orders on which 25 per cent. is collected, and apply the same on the price of the order." This answer came through the hands of the sheriff, and when it was exhibited to the authorities Sheard was released. On the 9th day of March, 1903, the plaintiffs wrote the defendant as follows: "20 Ranch, Forsyth, Mont., March 9, 1903. Omaha Wholesale Grocery Co., Omaha, Neb. Dear Sirs: On the 3d day of March I ordered the inclosed bill of goods from Albert A. Sheard who represented himself as one of your salesmen. I gave him a check for (\$96.32-100) ninety-six dollars and thirty-two cents, made out to the Omaha Wholesale Grocery Co. Do you authorize him to sign the company's name and collect such checks. This bill of goods was to be delivered at Rosebud, Mont., the 15th day of April, C. O. D., for the balance of the bill (\$278.45) two hundred seventy-eight dollars and forty-five cents, as we paid in the check two dollars and fifty cents (\$2.50) express on silver (he said he was allowed to give away), and also one dollar for error in the bill. Will the goods be at Rosebud as ordered in bill on the 15th day of April. Please answer this at once, and oblige, yours respectfully, A. D. Howard & Co."

In reply to the foregoing, the plaintiffs received from the defendant the following: "Omaha, Neb., Mar. 14, 1903. A. D. Howard & Co., Forsyth, Mont. Gentlemen: Mr. A. A. Sheard has handed us your note and order for a bill of groceries. Said bill amounts to \$374.79 and shows amount collected, \$96.32, leaving a bal. as shown by your note of \$278.47. Owing to the trouble caused by the unwarranted proceedings of one Mr. Philbrick in having Mr. Sheard arrested and placed in jail for making these collections, we do not feel that we can ship goods up there without the pay for them, and must ask you to kindly send us a draft for the balance of your bill \$278.47, on receipt of which we will ship your goods at once. We

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respectfully refer you to the Union Nat'l Bank of this city as to our standing and reliability. In doing business where people are so conservative, we believe in returning the compliment and using the same conservative methods and trust they may prove entirely satisfactory to you, as it is the only way we can accept your order or ship the goods. Awaiting your favor, we are, yours very truly, Omaha Wholesale Grocery Co."

The defendant's letter admits the receipt of the order through Sheard, and acknowledges the payment which had been made to him thereon. It shows resentment at his arrest in Montana, and characterizes it as "unwarranted." When we recall that he was arrested on the suspicion that his claim of authority to sell goods and collect money for the defendant was false and fraudulent, the defendant's characterization of his arrest as "unwarranted" becomes significant. The letters and telegram were all competent evidence. To our minds they are amply sufficient to establish Sheard's authority to take the order and receive the cash payment thereon. In fact they hardly admit of any other reasonable inference. Incompetent evidence was also received for the same purpose, but as the trial was to the court, without a jury, the reception of such evidence was not prejudicial.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ELIZABETH E. ROWND ET AL., APPELLANTS, v. WILLIAM
HOLLENBECK ET AL., APPELLEES.

FILED JUNE 20, 1906. No. 14,396.

1. **Findings: REVIEW.** The findings of the trial court on conflicting evidence in an action at law will not be disturbed on appeal unless manifestly wrong.
2. **Sale: RESCISSION.** Where by the terms of a contract of sale payment of the price is to precede a delivery of the goods, the repudiation by the vendor of a substantial condition of the contract on his part to be performed will justify a rescission of the contract by the vendee.
3. **Evidence examined, and held** sufficient to sustain the findings of the trial court.

APPEAL from the district court for Hall county: JAMES R. HANNA, JUDGE. *Affirmed.*

Harrison & Prince, for appellants.

O. A. Abbott and Henry Mitchell, contra.

ALBERT, C.

This action was brought by Elizabeth E. Rownd and Willis E. Rownd against William Hollenbeck to recover the balance due on a contract for the sale of certain chattels. It is alleged in the petition that on the 23d day of January, 1904, the plaintiffs sold to the defendant, Hollenbeck, the hotel furniture, fixtures, etc., in the St. James Hotel in Grand Island, for which said defendant agreed to pay the plaintiffs the sum of \$2,700, \$50 cash in hand, and the remainder on the 25th day of January, 1904; that said defendant had paid the \$50, but had failed and refused to pay the remainder, or any part thereof. The pleadings and the evidence show conclusively that Vinnie Makely was the real vendee, and that Hollenbeck and another party merely acted as her agents. She was permitted to intervene, and the real controversy is between

her and the plaintiffs. In her answer, to the petition she alleges that a memorandum of the contract of sale was reduced to writing and that it was as follows: "Grand Island, Neb., January 23, 1904. Received of Henry Mitchell, agent, the sum of fifty dollars in cash as part payment on our hotel furniture and fixtures now in the St. James Hotel, Grand Island, Nebraska, the balance of the purchase price to be paid on Monday, the 25th of this month. The full purchase price to be paid for the furniture and fixtures is (2,700) twenty-seven hundred dollars, and the property to be sold includes all the property invoiced by Mr. Groff, Henry Mitchell and Mr. and Mrs. Rownd, also the dishes and table linen, kitchen furniture and fixtures not specifically listed; also the coal now in basement, and the organ now in the parlor. The dishes to be in accordance with the list shown Henry Mitchell, and the beds to be equipped as follows: Each bed to have three sheets, also each bed to have two pillows, four pillow cases, two comforters, one counterpane; and to assign over the insurance now on the property without charge, also the partitions in the pool-room and the one separating the parlor from the dining room. Made in duplicate on the day and year above written. We agree that the property shall be free from all taxes and incumbrances. To give possession to buyer February 1, 1904. Mrs. W. E. Rownd, W. E. Rownd. Witness: E. J. A. Hasenyager." The intervener also alleges that the inventory referred to in the foregoing memorandum was reduced to writing, and a copy thereof is set forth in her answer. It contains a long list of furniture, fixtures, etc., with the agreed price of each article set opposite thereto. The last item on the list is as follows: "For lease of building, \$265.20." The aggregate value of the items shown by the inventory set forth in her answer is \$2,700. She further alleges that on the 25th day of January, 1904, the date fixed by the terms of the contract for the payment of the remainder of the purchase price, she offered to pay the plaintiffs said remainder, provided they would pay certain taxes for the

years 1902, 1903, which were liens upon the property, discharge and procure a release of 6 chattel mortgages which were apparent liens thereon, and transfer their leasehold interest in the hotel to her, and that they refused to comply with these conditions; that upon their refusal she deposited the balance due on the contract in one of the banks at Grand Island, payable to their order upon a compliance on their part with said conditions; that on the 4th day of February, 1904, the plaintiffs having failed and neglected to comply with said conditions and to perform their part of the contract of sale, she rescinded the contract. Her answer also includes several counterclaims, among which is one for \$50 paid on the purchase price. The plaintiffs replied to the intervenor's answer, denying, among other things, that an assignment or transfer of their leasehold interest in the hotel was included in the inventory or contemplated by the contract of sale. The cause was tried to the court without a jury, and the trial resulted in a finding for the intervenor, and a judgment in her favor for \$50 and interest. The plaintiffs appeal.

One point in dispute between the plaintiffs and the intervenor is whether the plaintiffs' leasehold interest in the hotel was included in the contract of sale. That the plaintiffs made and signed the memorandum of the contract of sale set out in the intervenor's answer is admitted. That memorandum on its face makes no mention of the lease, but is not complete in itself. It refers to an invoice taken by "Mr. Groff, Henry Mitchell and Mr. and Mrs. Rownd" (plaintiffs). The evidence shows that these parties took an inventory of the property. When the inventory was taken Mrs. Rownd, one of the plaintiffs, undertook to keep a list of the property, and another was kept by Mr. Groff and Mr. Mitchell. There is no substantial difference between these lists, save that the list kept by Groff and Mitchell includes the item, "For lease of building, \$265.20" while that kept by Mrs. Rownd does not include that item. The plaintiffs both testify positively that the item referred to was not listed when the inventory was taken, and that

it was not the intention of the parties that it should be included in the contract. Groff, who assisted in taking the inventory, also testified that it was not mentioned in his presence, but his testimony is of a negative character because he was only there a portion of the time and was not there when the inventory was completed. The testimony of Mr. Mitchell is to the effect that he was acting for the intervener; that after the other items had been listed it was found that they footed up to \$2,435.80; that was less than the plaintiffs cared to take for their property, and they then told him that they wanted \$3,000 for it, and that in order to raise the inventory to that amount they would include their leasehold interest; that he rejected that proposition, but made them a counter proposition to the effect that he would raise the inventory to \$2,700 if they would include the leasehold interest; that they agreed to do this, and the leasehold was inventoried at \$265.20, the difference between the aggregate valuation placed on the other items of property and \$2,700. His testimony is corroborated by circumstances, one of which is that it is the most reasonable explanation of the fact that the amount which the intervener was to pay for the property was finally placed at \$2,700. However that may be, whether the leasehold was included is a question that turns on the credibility of the witnesses. This is not an appeal in equity, bringing the case here for trial *de novo*, but an appeal from a judgment in an action at law. The finding of the trial court, therefore, has all the force and effect of a verdict of a jury, and it is well settled that a verdict of a jury on conflicting evidence will not be disturbed on review unless manifestly wrong. *Travelers Ins. Co. v. Snowden*, 60 Neb. 263; *Hart v. Weber*, 57 Neb. 442; *Allsman v. Richmond*, 55 Neb. 540. In this case the finding is amply supported by the evidence.

As before stated, that the plaintiffs made and signed the memorandum is admitted; that the inventory set forth in the intervener's answer, which, among other items, contains the plaintiffs' interest in the leasehold, is the

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inventory referred to in the memorandum, and therefore a part of the written evidence of the contract, is established by the finding of the trial court, abundantly sustained by the evidence. Consequently, we must proceed on the theory that the leasehold was included with the other items of property which the plaintiffs agreed to sell to the intervener for \$2,700. Proceeding upon that theory, the conclusion reached by the district court necessarily follows. The contract is executory, save as to the cash payment of \$50 on the purchase price. The plaintiffs are seeking to enforce this contract against their vendee so far as it is favorable to themselves, while at all times repudiating a substantial condition thereof on their part to be performed. In other words, they are seeking to recover the price, and at the same time intending to withhold delivery of a substantial part of the property for which the price was to be paid. It is well settled that a person who purchases goods with a preconceived intention of not paying for them is guilty of a fraud upon his vendor. *Thompson v. Rose*, 16 Conn. *71, 41 Am. Dec. 121; 24 Am. & Eng. Ency. Law (2d ed.), 1100, 1101, and notes. The converse must be true, that one who obtains payment for goods with the preconceived intention of not delivering them or withholding delivery of a substantial portion is guilty of a fraud against his vendee. According to their own testimony, the plaintiffs never intended to transfer the lease. The record therefore (and we speak from it alone) places the plaintiffs in the position of asking the court to assist them in perpetrating a fraud upon their vendee. That the court will not lend its aid to such ends goes without saying. The plaintiffs' intention not to transfer the lease justified the intervener in treating the contract as at an end, and entitled her to a return of the \$50 paid on the contract.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

N. S. BROWN ET AL., APPELLEES, V. EDWARD BROWN ET AL.,
APPELLEES, GEORGE BROWN ET AL., INTERVENERS, AP-
PELLANTS.

FILED JUNE 20, 1906. No. 14,418.

1. **Wills: PRETERMITTED CHILD: BURDEN OF PROOF.** The burden of proof is upon a pretermitted child or grandchild to show that the omission to make provision for him in the will was unintentional. *Brown v. Brown*, 71 Neb. 200.
2. **Witnesses: OBJECTION TO COMPETENCY.** An objection to evidence on the ground that it is incompetent does not go to the competency of the witness.
3. ———: **CONFIDENTIAL COMMUNICATIONS: WAIVER.** The provisions of section 333 of the code against the disclosure of confidential communications may be waived by the party in whose favor they were enacted, and a party calling the attorney who has prepared his will as a witness thereto thereby impliedly consents that such attorney may disclose the facts and circumstances attending its execution, when the same is offered for probate or subsequently.
4. **Evidence examined, and held sufficient to sustain a finding that claimants were intentionally omitted from the will.**

APPEAL from the district court for Hamilton county:
ARTHUR J. EVANS, JUDGE. *Affirmed.*

M. F. Stanley and O. A. Abbott, for appellants.

Hainer & Smith and J. H. Edmondson, contra.

ALBERT, C.

This case is here on a second appeal. The facts are stated at some length in the opinion disposing of the first appeal. See *Brown v. Brown*, 71 Neb. 200. The questions presented by the record are: (1) Are the two grandchil-

dren, George and Mabel Brown, designated in the former opinion as interveners, included as beneficiaries under the residuary clause of the will? (2) If not thus included were they intentionally omitted from the will by the testator? The district court resolved both those questions against the interveners, and entered a decree accordingly. The interveners appeal.

The first question, while not necessary to a decision on the former appeal, is discussed at some length in the opinion. At that time we reached the conclusion that the interveners were not included in the residuary clause. We are satisfied with the conclusion and think a further discussion of the question at this time would be profitless.

The second question is one of fact, and it is now contended that the finding of the trial court thereon is not sustained by sufficient evidence. As held on the former appeal, the burden of proof is upon the interveners to show that their omission from the will was unintentional. The principal testimony relied on as showing that fact is that given by the widow of the testator. She testified that toward the close of his life, and at the time the will was made, he was very forgetful; that he would go to town, come home again, and forget for what he had gone. What seems to be the material portion of her testimony as to the testator's testamentary intentions is as follows: "Q. You may state whether you ever heard him say anything about his intention as to his children and grandchildren, as to remembering them in his will or anything in regard to that matter? A. Well, I did not hear him mention the children, but he says, 'I want my heirs, my grandchildren, to have their money'; he did not mention them, but he said 'all of them.' He says, 'all of them,' all of my grandchildren, I want them to have \$100 apiece." Q. Did he say to you at any time what would be the result if he didn't do that? A. He never mentioned their names, he just told me over and over again, 'I will my grandchildren,' he says, 'all of them \$100 apiece.'"

Cross-examination: "Q. You knew Mr. Brown had made

his will, about the time it was made, did you not? A. I know pretty near when it was made. Q. He brought a copy of that will home with him after it was made? A. Yes; he did. Q. And you and he read that copy over, and knew what was in it? A. I knew pretty near what was in it, but he had it made over after that, he come to town, and after he got back he says, 'I made that will some different.' And I says, 'How?' And he says, 'I willed my grandchildren, all of them \$100 apiece.' He fetched the deed (will) home in his pocket. Q. And he kept that among his papers at home? A. Yes; he kept it locked up. And that is the words he says to me when he got home, he says, 'I want my grandchildren to have \$100 apiece.' Q. And a copy of that will was among his papers after he died? A. Yes, sir. Q. And it was where he could have access to it any time he wanted it? A. Yes, sir. Q. Do you know of his reading it over several times? A. No, I don't, he never read it but once that I know of. Q. When was that, just after it was made? A. Just after the last will was made after he changed the will. Q. He first had a will in which he left them all out? A. Yes, sir. Q. And he wanted to do that in his first will? A. Yes, sir; and then he made it again and he says, 'I must will my grandchildren all of them \$100 apiece.' Q. There was some of his grandchildren in Iowa that he didn't want to leave anything? A. I suppose so—the silly one I suppose. Q. And you and he had talked that matter over? A. I don't know. Well, he did say, too, that Charlie was silly, and he didn't need it, that's about all he ever said about 'Charlie.' The testimony of the wife, as to the testator's memory, is corroborated by several other witnesses who give many specific instances showing extreme forgetfulness on his part.

On the other hand, the attorney who prepared the will for the testator, and who signed it as a witness, testified on behalf of the appellees. Among other questions, he was asked: "You may state what, if anything, was said at the time of the preparation of that will with regard to the

grandchildren of Henry S. Brown, deceased, and being the children of the deceased son by the name of Albert Brown, who had died prior to the death of his father and prior to the making of that will?" The interveners objected on the ground that the evidence was incompetent and immaterial. The objection was overruled, and the witness answered as follows: "We had a great deal of conversation at the time about his will, the terms and provisions of the previous will, and also of this will, were discussed fully. He told me of his sons who were dead, and he gave me the names of his grandchildren, six who are mentioned in the will as drawn, and told me the provision which he wished to make for them. As I now recall it, he did not give me the names of those grandchildren who were not provided for by the will, but acquainted me with the fact that there were other grandchildren. Then, in taking the memorandum, I called his attention to the fact that he had already made one will which was unsatisfactory, and also called his attention to the fact that I advised him at the time that it would prove so, and suggested to him the advisability and wisdom of his stating to me all the facts and circumstances, that I could better prepare his will, that he wasn't making provision for all of his grandchildren. He was a very quiet and determined sort of a man, and sat and eyed me for a little time, and then said: 'Mr. Hainer, I have told you how I wanted this will drawn. I can't talk about it without getting angry, and I don't want to be angry when I am making my last will. You make that will as I told you.' And, complying with that peremptory order, I prepared the will. That was the substance and conclusion of the conversation respecting the grandchildren."

The objection to the foregoing evidence is couched in the most general terms. The intervenor's brief merely calls attention to the fact that the evidence was admitted over their objection. As the issue was whether the interveners had been omitted from the will by oversight or inadvertence, we think evidence of what was said at the time

the will was drawn, so far as it goes to show that they were before the mind of the testator at that time, would be competent and material. The competency of the witness who testified to such facts is not challenged by the general objection interposed, because the rule is that an objection to the competency of evidence, does not, ordinarily, go to the competency of the witness. *Chicago, K. & N. R. Co. v. Behney*, 48 Kan. 47; *Cornell v. Barnes*, 26 Wis. 473; *Carter v. New York E. R. Co.*, 134 N. Y. 168. But, had the objection gone to the competency of the witness, it would have been unavailing. It is true, he is the attorney who prepared the will for the testator, and the communications made to him with respect thereto and for his guidance in drawing the will are in the nature of confidential communications, but he was also called as an attesting witness and signed the will as such. While section 333 of the code prohibits the disclosure of confidential communications made to a practicing attorney, and certain other classes of professional men, the next section provides that such prohibition may be waived by the party in whose favor it was enacted. When a will is offered for probate, the witnesses thereto may be examined at length as to the mental capacity of the testator, and the facts and circumstances attending its execution. And the testator, by permitting his attorney to become a witness to the will, thereby consented that he might be examined as a witness to such matters after his death. *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828; *Blackburn v. Crawfords*, 3 Wall. (U. S.) 175; *Denning v. Butcher*, 91 Ia. 425, 59 N. W. 69; *In re Will of Coleman*, 111 N. Y. 220; *Daniel v. Daniel*, 39 Pa. St. 191; See also *Western T. A. Ass'n v. Munson*, 73 Neb. 858. Indeed, it has been held that the general rule excluding confidential communications made to an attorney does not apply to communications made while giving instructions for drafting a will, especially when those attacking the will seek to take advantage of the privilege. 3 Jones, Evidence, sec. 773. But it is not necessary to go to that extent in this case, the waiver to be implied from permitting

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the attorney to attest the will as a witness being sufficient ground for the admission of the evidence in question. The witness above referred to also testified that he prepared the will and gave it to the testator, who took it home with him, and came back the next day and signed it, retaining a carbon copy. The original was filed with the county judge.

A son of the testator was also examined as a witness, and testified to a conversation had with the testator after the will was made. The testator showed him a copy which he had retained, and reference was then made to the omission of any provision for the interveners and another grandchild, who is not a party to this proceeding. In that conversation, the reason given by the testator for not providing for the latter grandchild was that the child was confined in an insane asylum, which appears to have been true. The witness then asked him why he had not provided for "brother Bert's" children (the interveners). The witness thus gave the testator's answer: "They had trouble, and, well it was something about some money matters that they had their difficulty, and he said that he couldn't conscientiously give those children anything." There is other evidence tending to show that there was some difficulty between the testator and one or both of the parents of the interveners, but the nature of this trouble, its origin, and whether it was of a serious character or otherwise, is not made clear by the evidence. There is also evidence to the effect that the testator had sufficient memory to remember his near kin, knew his children and grandchildren, where they lived and how they were situated in life. Several witnesses were called who testified that he was a man of fair memory, one at least going to the extent of saying that he would consider him equal to if not above, the average man in the transaction of business matters. His family physician testified that he was a man of fairly good memory, and seemed to be very careful and methodical. That the will was admitted to probate conclusively establishes the fact that the testator was of sound mind and memory when it was executed. In

short, taking the entire evidence as to the state of the testator's memory when he made the will, the inference we draw therefrom is that his memory was about such as one would expect to find in a man of his years, and that, in the absence of a more reasonable explanation, the omission of these grandchildren from the will might be accounted for on the theory of forgetfulness on the part of the testator. But that theory, at best, would rest largely on conjecture. It is met by the positive testimony of the attorney who prepared the will, and of the son who talked with the testator concerning its provisions after it was made. The testimony of these witnesses is irreconcilable with the theory that the omission of the interveners from the will was due to oversight or forgetfulness, and we find nothing in the record that would justify us in rejecting their evidence. Giving the evidence of these two witnesses the weight to which it is entitled upon the facts and circumstances disclosed by the record, and considering it in connection with the other evidence adduced, we consider it amply sufficient to sustain the finding of the trial court. We have not overlooked the testimony of the wife of the testator as to the statement made to her by the testator as to his testamentary intentions and the provisions of the will after it had been made. According to her testimony, although he retained a copy of the will, he never showed it to her. He may have had what seemed to him good reasons for concealing or misstating its contents. But, however that may be, laying aside the usual presumptions attending the findings of the trial court, the evidence satisfies us that the omission to provide for the interveners is not due to accident, mistake or forgetfulness on the part of the testator, but that such omission was intentional.

It is recommended that the decree of the district court be affirmed.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

CITY OF MCCOOK V. ROSELAND PARSONS.

FILED JUNE 20, 1906. No. 14,346.

1. **CITIES: PRIVATE CROSSINGS: LIABILITY.** A city is not liable for damages sustained by reason of a defective crossing from private property into a public street.
2. ———: **PERSONAL INJURY: INSTRUCTIONS.** In an action against a city for damages sustained by reason of a personal injury, an instruction from which the jury might infer that the city would be liable for negligently permitting a walk in general use by the public over property not shown to be within the corporate limits of the city to become and remain in a dangerous condition, is prejudicial error.

ERROR to the district court for Red Willow county:
ROBERT C. ORR, JUDGE. *Reversed.*

J. S. LeHew and Boyle & Eldred, for plaintiff in error.

Starr & Reeder, contra.

JACKSON, C.

Roseland Parsons recovered judgment against the city of McCook in an action for damages, alleged to have been sustained by reason of falling from a defective walk, and the city brings error.

The station grounds of the Burlington railroad company at the city of McCook are approached from the north by Main avenue on the west, and Marshall street on the east. Railroad street extends east and west on the north side of the station grounds. Marshall street terminates on the south side of Railroad street. Main avenue is the principal thoroughfare from the city to the station.

The railroad station is at the west end of the depot grounds on a line with the east side of Main avenue. East of the depot is a lunch room and the residences of railroad employees on the depot grounds. The residences are surrounded by a small railroad park inclosed by a fence. The park extends east to a line about parallel with the center of Marshall street and to a line six feet south of the south line of Railroad street. The space between the park and the south line of Railroad street is occupied by a ditch or waterway, running east and west. The distance across the bottom of the ditch at the east end of the park is six feet. On the east side of the block, directly north of the depot grounds, a sidewalk extends from the north to a point about 40 feet north of the south line of the block. At the east end of the railroad lawn the company many years ago constructed, and has since maintained, for the convenience of its employees, a three foot plank walk extending from the platform on the south side of the depot to a point seven feet south of the south line of Railroad street. From that point it constructed a bridge extending in a northwesterly direction across the waterway. The bridge is connected with a culvert extending from the north end of the bridge in a northwesterly direction to the end of the sidewalk on the west side of Marshall street. The walk at the east end of the railroad lawn, the bridge across the waterway and the culvert for one-half the distance across Railroad street were always maintained, to the time of the accident at least, by the railroad company, whose employees were under instructions from the company to maintain this walk and bridge in good repair. On the southeast corner of the second block, immediately north of the depot grounds, is the National Hotel, of which, at the time the accident occurred, the defendant in error was proprietor. One of the passenger trains over the Burlington road was due at McCook shortly after midnight. Defendant in error went to the depot for the purpose of meeting that train and soliciting patronage for his hotel. Upon returning to the hotel, he went along the

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walk east of the railroad park, and testified that it was so dark that, in attempting to cross the bridge, he approached the outer edge, when a decayed plank gave way and precipitated him into the ditch below, where he fell on a piece of scantling lying in the bottom of the ditch, and sustained the injuries because of which the action is brought. Concerning the fall, he testified that it was about seven feet and a half from where the walk made the turn to where he fell. The walk over which Parsons was traveling at the time of the accident was used, not only by the employees of the railroad company, but by all other persons who might wish to enter the depot grounds from Marshall street. The culvert extending from the bridge to the sidewalk on Marshall street was of plank and was used as a walk by persons traveling that way.

The plaintiff in error objected to the introduction of any evidence on behalf of the defendant in error, for the reason that the petition failed to state facts sufficient to constitute a cause of action. The objection was overruled, and proper exceptions taken. This objection has been properly preserved in the record, and is included in the assignments of error. The objection, in our opinion, is well taken. It does not appear from the petition either that the depot grounds or the place where the accident occurred were within the corporate limits of the defendant city, and the objection to the introduction of evidence should have been sustained.

At the trial the court instructed the jury as follows: "I instruct you, if you find from the evidence that the place where plaintiff claims he was injured was a traveled way and walk that had been in general use by the public for many years before the alleged accident, that such walk was and has been used generally by persons having occasion to go from one part of the city to another, and particularly along Marshall street to the railroad depot or vicinity, so that said walk became known and was used as a common public way for the travel of foot passengers, then, under such conditions, so far as this case is con-

cerned, said walk became and was a public walk of the city. If you should determine from the evidence, however, that said walk was not generally used as a public way for pedestrians and had not become known as a public walk, then the city would not be liable in this case; for the law imposes upon the city no obligation to construct, maintain or repair any approach from a railroad company's property to the sidewalks of the city, or from other private property." This instruction was at least misleading. The jury might easily infer from the language employed that, although the accident to Parsons occurred on the railroad ground, still, if it was on a traveled way in general use by the public for many years before the accident, the city might be liable if it had negligently permitted the walk to become in a dangerous condition. User alone does not constitute a public way, and a city is not ordinarily liable for an accident occurring on an approach from private property into a public street. *Goodin v. City of Des Moines*, 55 Ia. 67. There is no evidence that the city ever asserted jurisdiction or assumed authority over the walk on the company's right of way and depot grounds, and consequently no estoppel arises as against the city.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

CYRUS E. RUSSELL, APPELLANT, v. ADDIE RUSSELL, AP-
PELLEE.

FILED JUNE 20, 1906. No. 14,354.

Evidence examined, and held to sustain the decree of the trial court.

APPEAL from the district court for Jefferson county:
WILLIAM H. KELLIGAR, JUDGE. *Decree modified.*

John C. Hartigan, for appellant.

John Heasty, contra.

JACKSON, C.

The plaintiff appealed from a decree denying him a divorce and the custody of minor children, and requiring him to pay his wife for her support and the maintenance of the children the sum of \$20 a month, and to provide his family with electric light and fuel. Submitted with the main question is an application on the part of defendant for the allowance of attorney's fees in this court, together with a showing that the allowance for support made in the trial court has only been partially paid. At the time of the trial both parties were residents of Jefferson county. The decree required the defendant to retain the children within the state and afford plaintiff reasonable opportunity to visit them on suitable occasions, and from the affidavit of plaintiff it appears that since the rendition of the decree the defendant has removed with the children to Greeley county, and that fact is urged as a reason why he should no longer be required to pay the amount allowed for maintenance.

The evidence fully justifies the conclusion reached by the trial court that the plaintiff was not entitled to divorce. The parties had not lived together for some months prior to the commencement of the divorce proceedings. The

plaintiff is and has been employed for a number of years as engineer in an electric lighting plant at Fairbury. His duties require him to be in attendance at his labors in the nighttime. He became suspicious of the fidelity of his wife, and proved some indiscretions on her part, which she frankly admitted. The evidence, however, fails to show anything of a criminal nature. It is easy to understand how a man employed as he was, being required to work in the night and sleep in the daytime, and thus deprived of such association with his family as ordinarily falls to the lot of the husband, might more readily be induced to misconstrue the acts and associations of the wife than he otherwise would. He was receiving a salary of \$70 a month, and prior to the divorce proceedings he contributed to the support of the family \$20 a month out of his salary and furnished them with electric light and fuel, as he is now required to do by the decree of the court. The fact that he was to continue providing light for the home was doubtless due to the nature of his employment, and, since the defendant has removed with the children to Greeley county, the decree should be modified so that he no longer be required to furnish electric light. It would no doubt be impossible for him to do so, nor would it be convenient to attend to furnishing fuel. The removal of the family, however, to the county of Greeley should not operate to relieve him from otherwise performing the decree. Such removal is not a violation of the order of the court.

It is recommended that the decree be modified, and that the plaintiff hereafter be required to pay to the defendant the sum of \$24 each month, and the sum of \$50 as fees for counsel representing the defendant in this court.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is modified, and the plaintiff is required to hereafter pay to the defendant the

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sum of \$24 each month, and the sum of \$50. as fees for counsel representing the defendant in this court.

DECREE MODIFIED.

JOHN M. MACFARLAND, APPELLEE, V. ALEXANDER A. ALTSCHULER, APPELLANT.

FILED JUNE 20, 1906. No. 14,384.

Attorneys: PARTNERSHIP: ACCOUNTING. In the absence of an express agreement to the contrary, any professional service rendered by a member of a firm of lawyers should be presumed to be for the benefit of the firm.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Decree modified.*

I. J. Dunn, for appellant.

Weaver & Giller and John M. Macfarland, contra.

JACKSON, C.

This action is for an accounting between former partners. The principal controversy is over the construction of a written agreement entered into by the parties at the time the partnership was formed. That part of the agreement over which this contention arises is in this language: "It is agreed between the parties hereto that they form a partnership in the practice of law in the city of Omaha, and to share and share alike in the profits therefrom. That so far as the business of John M. Macfarland is concerned, said business and all fees due and to become due is to be shared alike by the parties hereto, excepting the fees due said Macfarland in the *Bohln* and *Cunningham* cases." At the time this agreement was entered into Macfarland was of the Douglas county bar and maintained his office in the city of Omaha, while Altschuler was of the Lancaster county bar and maintained his office in the

city of Lincoln. Shortly after signing the memorandum of partnership agreement, Altschuler removed to Omaha, and the business of the firm was conducted under the name of Macfarland & Altschuler. Each member of the firm, at the time the partnership was formed, had unfinished business pending in the courts, and the most important question is whether, under the terms of the written agreement, the appellant should be required to account to the firm for fees received by him on account of unfinished business which he had on hand at the time the partnership was formed. The trial court required him to so account, and in that respect the decree is manifestly just. In the absence of an agreement to the contrary, any professional service rendered by a member of a firm of lawyers should be presumed to be for the benefit of the firm, and such course was, without doubt, contemplated by the partners in this case. The exception in favor of Macfarland in the *Bohln* and *Cunningham* cases strengthens the conclusion reached.

The account stated by the district judge includes items of fees collected for services, a portion of which was rendered by individual members of the firm, after the dissolution of the partnership, in litigation where the firm had been retained prior to dissolution, as well as those received by appellant on account of business which he had on hand, where a portion of the services had been performed prior to the partnership agreement, and it is urged that these amounts should be diminished by the value of the services performed, both before the partnership and after its dissolution. It appears, however, in the decree that after the account was stated by the trial judge it was announced that the case would be reopened, if desired by either party, for the purpose of receiving evidence as to the fair and reasonable value of such services; that each party disclaimed any desire to offer further evidence, and the account was accordingly stated without reference to the value of the services involved. In view of this condition of the record we do not think either party should now be permitted to complain. The account is stated from a mass

of testimony covering more than 600 pages of typewritten matter, and some of it, at least, from conflicting evidence. The important witnesses testified in open court, and the trial judge had opportunities for determining their credibility not enjoyed by this court. We have examined the evidence with care, and think that the conclusions of the trial court should be adopted, with the exception of two items in the account charged against the appellant. He is charged in the statement of account with \$1,600 in fees in what is called the *Bentley-Baker* case. The finding is based solely upon the testimony of the appellee that appellant informed him that he had received \$1,600 in fees in that case. On the other hand, the sworn testimony of the appellant, in accounting for cash received in that case, discloses that he received, as a matter of fact, only \$1,000, and our conclusion is that he should be charged in the account with the sum of \$1,000 only. He is also charged with the sum of \$31 for services in *Kindrich v. Seigel-Cooper Co.* It appears that all fees received in that case were paid out in costs and expenses, and that it is not a proper charge. In all other respects the decree has ample support in the evidence. The total sum which the decree requires the defendant to account for is \$1,460.50, while the total of the sums which the plaintiff is required to account for is found in the decree to be \$1,180.76, including a personal indebtedness of the plaintiff to the defendant amounting to \$613.61, secured by chattel mortgage on the plaintiff's library. By the decree the chattel mortgage is canceled, and the plaintiff is given judgment for \$279.74.

We recommend that the decree be modified, by requiring the defendant to account for the sum of \$1,145 only, and that he have a judgment in this court for a remainder of \$35, and a decree foreclosing the chattel mortgage for that amount.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is modified, by requiring the defendant to account for the sum of \$1,145 only, and that he have judgment in this court for a remainder of \$35, and a decree foreclosing the chattel mortgage for that amount.

JUDGMENT ACCORDINGLY.

GERTRUDE McDOWELL, APPELLANT, V. JAMES T. MARKEY
ET AL., APPELLEE.

FILED JUNE 20, 1906. No. 14,393.

Mortgages: FORECLOSURE: EVIDENCE. In an action to foreclose a real estate mortgage, the plaintiff is required to allege and prove, as against the owner of the equity of redemption, that no proceedings at law have been had for the recovery of the debt secured by the mortgage.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

R. R. Dickson and Charles Battelle, for appellant.

M. F. Harrington, contra.

JACKSON, C.

On December 11, 1902, the plaintiff instituted this action in the district court for Holt county to foreclose a real estate mortgage given March 30, 1889, to secure the payment of a promissory note payable to the Nebraska Mortgage & Investment Company April 1, 1894. The petition contains this allegation: "That there has been no action at law to collect said bond or interest, neither has any been commenced nor has the same been paid." The defendant, James F. Shoemaker, answered, admitting the

execution of the note and mortgage, and denying the other allegations of the petition. He pleads title to the real estate acquired through a judicial sale in a proceeding to foreclose a tax lien, and that in the tax foreclosure the Nebraska Mortgage & Investment Company was made a party defendant and properly served with summons; that no assignment of the mortgage had ever been recorded, and that the lien of the mortgage was divested in that proceeding. The reply put in issue the allegation of proper service on the Nebraska Mortgage & Investment Company. The finding in the district court was against the plaintiff, who has appealed.

It appears that the note secured by the mortgage was assigned soon after its execution, and later became the property of the plaintiff. No assignment of the mortgage was ever recorded in Holt county, and no notice is brought home to the plaintiff in the tax foreclosure that any one other than the Nebraska Mortgage & Investment Company had any interest in the mortgage. The mortgage company became insolvent, and its affairs were wound up by a receiver appointed in the federal court. It was a Dodge county concern, and in the tax foreclosure service was had on the receiver in Douglas county, and on the mortgage company by leaving a copy at its last place of business in Dodge county. The premises where the summons for the mortgage company was left were, at the time of the service, occupied by a jeweler, and had not been occupied by the mortgage company for some years. There is no pretence of service on any officer of the company, although the president of the company, at the time of the service, was a resident of Dodge county, and it is claimed that the service on the mortgage company was void, and therefore that the lien of the mortgage has never been divested. We do not think it necessary to determine that question. It does appear that proper service was had in the tax foreclosure on the owner of the title, and Shoemaker, who purchased at the judicial sale, acquired, at any rate, the equity of redemption.

The only evidence offered in support of the allegation that no proceedings at law had been had for the recovery of the debt secured by the mortgage is found in the testimony of the witness Meredith, who testified that the note and mortgage came into his possession for collection about the 20th or 25th of May, 1902, and that no action at law had been commenced to collect the note after it came into his possession. That, it will be observed, was more than eight years after the maturity of the note. This evidence does not meet the requirements of the statute.

It is the contention of the appellant that Shoemaker is a mere lien-holder, and that as between lien-holders no proof was required that no proceedings at law had been had for the recovery of the debt, citing our holding in *Chaffee v. Sehestedt*, 4 Neb. (Unof.) 740; but, as we have already determined, Shoemaker, on any theory of the case, was the owner of the equity of redemption, and, having denied the allegation of the petition that no proceedings had been had for the recovery of the debt, it was incumbent on the plaintiff to make proof of that fact as against him. *Pratt v. Galloway*, 1 Neb. (Unof.) 168, 172.

The decree of the district court was right, and we recommend that it be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FARMERS & MERCHANTS IRRIGATION COMPANY, APPELLEE,
v. UNITED STATES FIDELITY & GUARANTY COMPANY,
APPELLANT.

FILED JUNE 20, 1906. No. 14,407.

Principal and Surety: BONDS: ESTOPPEL. Where a bonding company, with knowledge of an informality in the execution of a bond by its agent, receives and retains the premium paid for the bond, it is estopped in an action on the bond from urging such informality as a defense.

APPEAL from the district court for Dawson county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

George C. Gillan, for appellant.

E. A. Cook, contra.

JACKSON, C.

The appellant is a bonding company. It gave power of attorney authorizing Charles F. Horner, together with George C. Gillan, both of Dawson county, to execute and deliver bonds required in judicial proceedings. On October 5, 1903, the appellee recovered judgment before the county judge of Dawson county against Andrew Anderson, and, for the purpose of prosecuting an appeal to the district court, Anderson and his attorney applied at Mr. Horner's office for an appeal bond. Horner was absent, but his clerk, after taking a property statement from Anderson and receiving payment of the premium, prepared and delivered to Anderson's attorney a bond in due form, signed: "United States Fidelity & Guaranty Co., By Chas. F. Horner, S., Attorney in Fact." There is a conflict in the evidence as to the fact of delivery; Horner's clerk testified to having told Anderson's attorney that it would be necessary to secure the signature of Mr. Gillan to make the bond effective, while the attorney asserts with equal force that no such statement was made. His testimony has some support in the fact that no blank space appeared on the bond for Gillan's signature. The bond

was presented to the county judge, and by him approved October 10, 1903, and Anderson was thereby enabled to, and did, prosecute his appeal, which on March 13, 1904, was dismissed, and the fact of dismissal certified to the county court, where execution was issued and returned, "No property found." From a judgment on the bond, the surety company appeals.

It interposed the defense that the power of attorney authorized the execution of bonds only by the joint act of Horner and Gillan, neither of whom, it is alleged, signed the bond in suit. It was disclosed in evidence that the bond, while appearing on its face to have been executed on behalf of the company by Horner as attorney, was in fact signed in his name by the clerk. Mr. Anderson's attorney, who was a witness on behalf of the appellee, testified to a previous conversation with Mr. Horner relative to procuring bonds in judicial proceedings; he was told by Mr. Horner that his clerk had authority to execute the bonds. This statement is not denied, and in view of the attitude of the appellant we do not think it important. Mr. Horner was informed of the execution and delivery of the bond on the next day after the delivery. His testimony in that respect is: "Q. When Mrs. Shanklin told you about the execution of the bond, did you report its execution to the company? A. I did. Q. When? A. Immediately or nearly so, within a very short time. Q. Did you report to them how the bond was executed, how it had been signed, or did you send them a copy of the bond? A. I sent them the application, and they then asked for a copy of the bond. Q. Did you furnish them a copy of the bond? A. I did. Q. Did you receive any communication from the company? A. I did. Q. Is it not true that the company complained that you had not taken security enough for this bond? Wasn't that the complaint that the company made? A. That is true. Q. Is it not true that the company did not make any other complaint, except that you didn't take security enough? A. That is also true. Q. You say you tendered back to Mr. Rhea the money. When did you do

that? A. Well, it was a long time after this bond was executed, I really cannot say when. Q. By a long time, what do you mean? Several weeks? A. Yes, sir; it was more than several weeks. Q. Several months? A. I think so; yes, sir. Q. Did you go to the county judge and say to him that the bond had not been properly executed? A. I did not. Q. Never spoke to him about it? A. I think I did, but it was after the bond was approved. Q. How long after? A. It was some time after. Q. What do you mean by some time? A. Well, it was months after. Q. When you learned of the execution of this bond, did you go to the plaintiff in this case, or to myself as its attorney, or any of its agents, and inform them that the appeal bond had not been properly executed? A. I did not, unless Mr. Rhea was one of the parties named."

The record discloses that Rhea was attorney for Anderson in the proceedings where the bond was obtained, and therefore did not represent the appellee.

Concerning the complaint about the bond, Mr. Rhea testified that there was a complaint made some time after the bond had been approved, that the company was not satisfied that it was secure, and requested him to have Anderson come in and give a chattel mortgage; that no one on behalf of the bond company ever tendered the premium back to him. It appears then that, with a full knowledge of all the facts, the bond company retained the premium, and made no complaint of any informality in the execution of the bond, and it should now be estopped from insisting on any such informality as a defense. It enabled Anderson to prosecute his appeal, the county judge, in good faith, approved the bond, and the appellee, relying upon the sufficiency of the bond, refrained from any attempt to enforce its judgment until after the dismissal of the appeal.

It is clear that the judgment of the district court is right, and we recommend that it be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOSEPH STEGER, APPELLEE, v. JOSEPH KOSCH, APPELLANT.*

FILED JUNE 20, 1906. No. 14,414.

1. **Statute of Frauds: SALE OF LAND: POSSESSION.** Continued possession by a tenant is not such a part performance of a verbal contract for the purchase of land as to take the case out of the statute of frauds. Possession, to have such an effect, must be clearly shown to refer to and result from the contract of purchase, and not the lease. *Lewis v. North*, 62 Neb. 552.
2. **Evidence examined, and held not to support the decree of the trial court.**

APPEAL from the district court for Butler county: **BENJAMIN F. GOOD, JUDGE.** *Reversed and dismissed.*

L. S. Hastings and C. H. Aldrich, for appellant.

A. M. Walling and W. M. Cain, contra.

JACKSON, C.

The plaintiff had a decree in the district court for the specific performance of an oral contract for the sale of real estate. The allegations of the petition relied upon to relieve the contract from the statute of frauds are, in substance, that the plaintiff entered into the possession of the lands with his family, and made valuable improvements thereon and paid a part of the purchase money. From the evidence it appears that the plaintiff was at one time the owner of the premises, which were heavily incumbered by mortgage. Being unable to meet the mortgage indebtedness, he sold the land to one Klosterman, but remained in possession as Klosterman's tenant, and was so possessed

* Rehearing allowed. See opinion, p. 150, post.

when Klosterman sold the land to the defendant in February, 1899. The lease with Klosterman entitled the plaintiff to remain in possession as tenant during that year. He was paying an annual rental of \$640. By the contract of purchase from Klosterman, the defendant succeeded to the landlord's right and became entitled to collect the rent for the year 1899.

After the purchase of the premises by the defendant, plaintiff remained in possession, and has paid as rent each year to the defendant the sum of \$640 until 1904, with the exception of a single year, when, owing to a partial failure of crops, the defendant waived the payment of \$200 on the rental account. The defendant demanded an additional 25 cents an acre rental for the year 1904, and notified the plaintiff that he would demand a further increase for the year 1905. The rent for the year 1904 is unpaid. The plaintiff is still in possession of the premises, and on his behalf the testimony tends to prove that on the 4th day of November, 1899, the plaintiff and his wife were requested by Klosterman to go to the office of Hastings & Hall, in David City, and execute a quitclaim deed to the land in dispute, for the purpose of perfecting his title, which it was thought was defective because of a decree of the district court for Butler county, rendered after the original conveyance from the plaintiff and his wife to Klosterman, subjecting the land to certain of the plaintiff's debts; that Klosterman, the defendant, the plaintiff and his wife met at the office of Hastings & Hall, where the quitclaim deed was prepared; that plaintiff's wife objected to signing the deed unless the defendant would sign a contract agreeing to reconvey the land to the plaintiff when the plaintiff might be able to pay for it; that the defendant said no such contract was necessary, that he would reconvey the land to plaintiff at any time within five, ten or fifteen years upon payment to him by the plaintiff of what he had in the land; that he wanted his money and not the land; that the quitclaim deed was thereupon signed and delivered. On behalf of the defendant there is evidence

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tending to prove that in April, 1899, the plaintiff and defendant had a conversation in which the plaintiff expressed a desire to purchase the land; that the defendant told him he might purchase the land at any time within five years from that date for what the land was worth; that he so informed the plaintiff's wife when the quitclaim deed was executed, and that no other or different agreement was ever made. The defendant's first wife was a sister of the plaintiff, and for many years they had enjoyed friendly and confidential relations. The defendant has appealed from the decree, and contends that the decree is not supported by the law and the facts.

This contention seems to be well taken. There is no explanation in the evidence of the plaintiff's possession of the premises other than his possession as a tenant, and, having been in possession as a tenant at the time when the plaintiff alleges the contract of purchase was made, the presumption is that he continued in possession as a tenant. *Bigler v. Baker*, 40 Neb. 325. Continued possession by a tenant is not such a part performance of a verbal contract for the purchase of land as to take the case out of the statute of frauds. Possession, to have such an effect, must be clearly shown to refer to and result from the contract, and not the lease. *Bigler v. Baker*, *supra*; *Lewis v. North*, 62 Neb. 552. There is a failure to prove any payments on account of the contract of purchase. The only payments made by the plaintiff were for rent, and the trial court in effect so found. The defendant paid \$8,106.25 for the land, and it is admitted that he subsequently paid taxes amounting to \$334.83, besides paying for some improvements and repairs. The decree provides for a conveyance upon the payment of \$8,156.25 purchase money, \$640 rent for the year 1904, and certain items of personal indebtedness not in any manner involved in the transactions concerning the land. It was proved at the trial, without controversy, that the land at that time was worth \$16,000. The plaintiff testified that each year after the alleged contract of purchase he planted trees on the farm;

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as affecting his claim of right, however, it is significant that he did the same thing each year while he was the tenant of Klosterman. He repaired fences and made certain other improvements, including a corncrib of about the value of \$250. The defendant testified that he was requested to build the corncrib, but declined to do so; that he gave the plaintiff permission to build the crib, with the understanding that he might move it at the termination of his lease or that he would buy it, as the plaintiff might desire.

Construing the evidence in the light most favorable to the plaintiff, if falls short of proving any performance of the contract on his part such as the law requires to take an oral contract for the sale of lands out of the statute of frauds, and we recommend that the decree of the district court be reversed and the cause dismissed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause dismissed.

REVERSED.

The following opinion on rehearing was filed February 21, 1907. *Judgment of reversal and dismissal adhered to:*

DUFFIE, C.

The former opinion by Mr. Commissioner JACKSON is reported, *ante*, p. 147. On motion for rehearing, filed by the appellee, we recommended a reargument of the case, fearing that an injustice might have been done. On the reargument, it is strongly insisted that our former opinion overlooked the nature of the consideration for the promise on the part of Kosch, which is the basis of the action. It is said: "It is undisputed that plaintiff was in possession under Klosterman asserting an equity in the property in question by virtue of an option to pur-

chase from the latter. That claim was recognized by Klosterman, who, in a suit by a creditor of the plaintiff, testified that he was under contract to reconvey to plaintiff upon payment of what he had in the land. Shortly thereafter Klosterman contracted to sell and convey to the defendant, Kosch, who undertook to purchase for the use and benefit of the plaintiff, his brother-in-law. Klosterman was, however, unwilling to convey, and Kosch unwilling to purchase, without the relinquishment of the plaintiff's claim. The parties accordingly met at the office of Hastings & Hall, where plaintiff and wife, after much urging and hesitation, quitclaimed their interest to Klosterman upon the express promise of the defendant, Kosch, to convey to plaintiff within the period of five or ten years upon the payment of \$8,000, the price of the conveyance to him." If this claim is supported by the evidence, if Steger actually had a contract with Klosterman for the purchase of this land which a court of equity would recognize and enforce, and he surrendered his right therein and quitclaimed his interest to Kosch, the consideration being Kosch's agreement to reconvey upon the payment of \$8,000, then we were in error in our former opinion, and the decree of the district court should be affirmed.

This necessitates an examination to some extent of a voluminous record, and the writer has gone through the bill of exceptions with great care in order to ascertain what the facts are relating to the evidence attending the conveyance made by quitclaim deed from Steger and wife to Kosch. Originally, Steger entered into possession of this land by purchase from Klosterman. He defaulted in payments to be made, and thereupon Klosterman took a reconveyance from him. While the evidence is not entirely clear upon the point, it appears that after this reconveyance Steger made some claim that Klosterman had obtained it by fraud, by misrepresenting the paper which Steger and his wife signed and acknowledged, and that thereupon Klosterman agreed to reconvey at any

time when payment of the full amount of the original purchase money agreed upon between them was made, with interest. The testimony bearing most closely upon this point grew out of the fact that a judgment creditor of Steger commenced an action to set aside the deed made by Steger to Klosterman, alleging that it was fraudulent and for the purpose of defeating his claim. One of the witnesses, on the trial of the case at bar, testified to the effect that Klosterman, on the trial of the creditor's suit, testified that he was under contract to reconvey the premises to Steger. On the other hand, witnesses testified that Steger, on that trial, testified that his reconveyance of the land to Klosterman was made in good faith because he was unable to pay for the land, and that Klosterman had refunded to him some of the money which he had paid on the purchase in full settlement of all equity which he had in the land; that the conveyance was an absolute one, and that he remained on the premises as tenant of Klosterman. There is evidence tending to show that Klosterman surrendered to Steger all evidence of indebtedness given by Steger for the purchase price. What evidence might have been produced on this question, had Steger brought an action against Klosterman alleging that his reconveyance was obtained by fraud and that Klosterman had agreed to reconvey, we cannot say; but certainly, from the evidence relating to the transaction between these parties contained in the record of this trial, no court would be justified in finding that any such contract existed between the parties as would justify a decree for a specific performance.

In the creditors' suit the court, instead of declaring the conveyance void as to the plaintiff's judgment and the judgment a first lien upon the land, entered a decree setting aside the conveyance from Steger to Klosterman, and ordering a sale of the premises if the amount of the judgment creditor's claim was not paid within a time limited by the decree. After this decree was entered Kosch commenced negotiating with Klosterman for the purchase

of the land, and the agreement of purchase was finally concluded. Counsel for Kosch, with commendable caution, in view of the character of the decree entered in the creditor's suit, advised Kosch that to make his title entirely clear it would be advisable to take a quitclaim deed from Steger and wife, and, as we gather from the evidence, it was in view of the terms of this decree, and not because the parties supposed that Steger had any actual interest in the land, that the quitclaim deed from Steger to Kosch was executed, and for which Kosch paid \$8,000 which appears to have been the actual value of the land.

An examination of the plaintiff's petition in this case discloses that no claim was made that Steger was in possession of the land under any contract of sale between himself and Klosterman, and that the quitclaim deed was made to convey any interest vested in him by such a contract. No claim of that kind was made in the original brief filed by the appellee, and upon the oral argument, when the case was first submitted, Mr. Commissioner JACKSON interrogated counsel for appellee as to whether, at the time of making this quitclaim deed, Steger was claiming any interest in the land derived from Klosterman, or any other party, and such a claim was distinctly disavowed. We cannot avoid the conclusion, from an examination of the petition, which is entirely silent as to any claim of this character, as is also the original brief filed on behalf of appellee, that the claim is now made, based on evidence that, incidentally, crept into the record on the trial of the case, but which was not directed to any issue of that character raised by the pleadings. The action was not founded on any such theory. The written opinion of the trial court does not touch upon the question. It was not advanced upon the trial, either in the district court or on the first submission of the case in this court, and a careful examination of the whole record convinces us that the plaintiff's claim to specific performance was based solely upon the alleged naked oral promise of Kosch to convey this land to the plaintiff upon the payment of

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\$25 an acre. That such oral promise cannot be enforced, even if established by uncontroverted proof, is sufficiently shown in the original opinion.

We recommend that the opinion first filed in this case be adhered to.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the opinion first filed in this case is adhered to.

REVERSED.

CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
AT
SEPTEMBER TERM, 1906.

STATE, EX REL. SPENCER LENS COMPANY, RELATOR, v. EDWIN
M. SEARLE, JR., AUDITOR, RESPONDENT.

FILED SEPTEMBER 21, 1906. No. 14,872.

ORIGINAL application for a writ of mandamus to compel respondent, as auditor of public accounts, to draw a warrant in payment of an allowed claim in favor of relator. Respondent demurred. *Demurrer overruled and writ allowed.*

Clark & Allen and Roscoe Pound, for relator.

Norris Brown, Attorney General, and W. T. Thompson, contra.

PER CURIAM. Demurrer overruled. Writ allowed. Opinion to be filed later.

The following opinion was filed November 10, 1906:

Colleges and Universities: EXPENDITURES. The money donated by the United States to the university of Nebraska by an act of congress approved March 2, 1887, and acts supplemental thereto, known as the "Experimental Station" fund, may be expended by the board of regents for the purposes expressed by the donation, without other or more specific legislative appropriation than that implied by section 2, art. VIII of the constitution, and contained in section 19, ch. 87, Comp. St. 1905.

BARNES, J.

This is an application for a writ of mandamus to compel the respondent, the auditor of public accounts, to draw a warrant in payment of an item of indebtedness due from a certain fund donated to the university of Nebraska by the United States. The fund in question was created by an act of congress, known as the "Adams" bill, which is supplemental to a bill passed and approved March 2, 1887, by which the university of Nebraska receives from the treasury of the United States \$15,000 annually for the purpose of carrying on experimental work in agriculture. The board of regents allowed the account and charged it against said fund. The auditor approved of the same, but declined to issue a warrant for its payment on the sole ground that the legislature had not specifically appropriated the fund in question for that purpose. So, the only question involved in this suit is whether the money received from the United States under the act of congress above mentioned can be expended by the university without a specific appropriation. The original bill, to which the Adams bill is supplemental, provides: "The sum of fifteen thousand dollars per annum is hereby appropriated to each state, to be specially provided for by congress in the appropriations from year to year, * * * out of any money in the treasury proceeding from the sales of public lands, to be paid in equal quarterly payments, * * * to the treasurer or other officer duly appointed by the governing boards of said colleges to receive the same." 24 U. S. Statutes at Large, p. 441, ch. 314. And the Adams bill contained the following directions: "The sums hereby appropriated to the states and territories for the further endowment and support of agricultural experiment stations shall be annually paid in equal quarterly payments on the first day of January, April, July, and October of each year by the secretary of the treasury, upon the warrant of the secretary of agriculture, out of the treasury of the United States, to the treasurer

or other officer duly appointed by the governing boards of said experiment stations to receive the same, and such officers shall be required to report to the secretary of agriculture on or before the first day of September of each year a detailed statement of the amount so received and of its disbursement, on schedules prescribed by the secretary of agriculture." 34 U. S. Statutes at Large, p. 63, ch. 951. Chapter 87, Comp. St., provides for the establishment of the university of Nebraska, and declares that the general government thereof shall be vested in the board of regents. By section 4 of said chapter it is provided: "The board of regents shall have full power to appoint their own presiding officer and secretary. And they shall constitute a body corporate to be known as 'the regents of the university of Nebraska,' and as such may sue and be sued, and may make and use a common seal, and alter the same at pleasure. They may acquire real and personal property for the use of the university, and may dispose of the same whenever the university can be advantaged thereby." It is further provided by section 2, art. VIII of the constitution: "All lands, money, or other property granted, or bequeathed or in any manner conveyed to this state for educational purposes, shall be used and expended in accordance with the terms of such grant, bequest, or conveyance." So, it seems clear that the board of regents not only has the power to accept the fund in question, but it is also its duty to do so and to expend it for the purposes declared by the acts of congress above mentioned.

It was stated on the hearing that from 1887 to 1899 the treasurer of the United States paid the money directly to the board of regents, who expended it without depositing it in the state treasury. During the year 1899, however, the state treasurer was made custodian of the university funds, and since that time the fund in question has been paid by the secretary of the United States treasury to the treasurer of this state in compliance with a resolution of the board of regents. It is contended by the respondent that, the fund having been paid to the state

treasurer, it cannot be expended by the board without a specific appropriation thereof by the legislature, and to sustain that contention our attention is directed to *Regents v. McConnell*, 5 Neb. 423; *State v. Liedtke*, 9 Neb. 468; *State v. Babcock*, 17 Neb. 610; *State v. Moore*, 46 Neb. 373. From an examination of those cases we find that in each of them the fund in question was money paid into the state treasury as taxes, and therefore it belonged to the state until specifically appropriated by the legislature to the use of the university, while in the case at bar the fund never belonged to the state. It was donated by the United States to the experiment station of the university for a specific purpose, and was paid to the state treasurer as the agent of the board of regents and custodian of the funds of the university. It never was, and is not now, any part of the funds of the state. The legislature of 1899, recognizing this fact, and presumably intending to put the whole matter at rest, passed a general law in which, after classifying the other funds of the university, it was provided as follows: "The agricultural experiment station fund shall consist of all moneys which may come into the possession of the state treasurer on and after July 1, 1899, accruing under an act of congress approved March 2, 1887, entitled 'An act to establish agricultural experiment stations in connection with the colleges established in the several states under the provisions of an act approved July 2, 1862, and the acts supplemental thereto'; also all moneys which may hereafter be received by virtue of any act of congress supplemental to said agricultural experiment station act and for the same purposes. The said experiment station fund is hereby appropriated to be applied exclusively to the uses and objects designated by the said act or acts of congress relating thereto, and the same shall at all times be subject to the orders of the board of regents for expenditure for said uses only." Section 19, ch. 87, Comp. St. 1905. In view of the nature of the fund in question, of section 2, art. VIII of the constitution, and the acts of the legislature above quoted, it seems clear that

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in general terms the expenditure of said fund by the board of regents is clearly authorized, and no other or more specific appropriation is neccessary.

For the foregoing reasons, the demurrer to the relator's petition is overruled, and as the respondent has elected to stand on his demurrer the writ of mandamus is awarded in accordance with the prayer of the petition.

JUDGMENT ACCORDINGLY.

ROBERT BICE V. STATE OF NEBRASKA.

FILED SEPTEMBER 21, 1906. No. 14,603.

Assault: EVIDENCE. To sustain a conviction for assault with intent to inflict great bodily injury, as defined by section 17b of the criminal code, the evidence must show an attempt to inflict an injury of a greater and more serious character than an ordinary battery.

ERROR to the district court for Boyd county: JAMES J. HARRINGTON, JUDGE. *Reversed.*

M. F. Harrington, for plaintiff in error.

Norris Brown, Attorney General, and *W. T. Thompson*, *contra.*

BARNES, J.

Robert Bice was convicted in the court below of an assault upon one James Adkins with intent to inflict great bodily injury, and was sentenced to a term of imprisonment in the state penitentiary. He has brought the record to this court for review, and will hereafter be called the defendant.

It is first urged that the verdict is not sustained by sufficient evidence. The information on which he was tried charged a violation of section 17b of the criminal

code, and we have held in several cases that the words "great bodily injury," as employed in that section, imply an injury of a greater and more serious character than an ordinary battery. *Murphey v. State*, 43 Neb. 34; *Likens v. State*, 63 Neb. 249.

A careful consideration of the entire testimony contained in the bill of exceptions satisfies us that the offense of which the defendant was convicted was not established on the trial beyond a reasonable doubt. It appears that the defendant and the prosecuting witness were in the village of Spencer, in Boyd county, Nebraska, on the 1st day of August, 1905, and happened to meet on the street, in front of a saloon conducted by one Joseph Corab. Both had been drinking, but the defendant was the more intoxicated. When he saw Adkins he said, in substance: "Here is a man who has been shunning me for a couple of months, and I am going to lick him right here." Some further talk ensued, in which the defendant threatened to lick the prosecuting witness, who at first was not disposed to fight. Seeing, however, that the defendant was determined to lick him, as he called it, he told him to pick his ground. The defendant threw off his vest, and struck at Adkins, but missed him, and thereupon clinched him, thus attempting to throw him to the ground. He failed in his attempt, for when the parties clinched it was found that Adkins was the better man. To use his own words: "I picked Bob up, and threw him down on the sidewalk, and choked him." He also said he thought at that time the defendant was trying to get his revolver out, and that he threatened to shoot. About that time parties interfered and took Adkins off from the defendant. As soon as they released him, however, he went back and turned the defendant over, and, as he says, "attempted to take the gun away from him." Up to this time the defendant had not drawn his revolver. The bystanders again seized the prosecuting witness and pulled him away from the defendant, who thereupon arose to his feet, and tried to draw his revolver. As soon as he had it in sight, a man by the name of Shan-

non grabbed it, took it away from him and delivered it to one Doctor Snyder. There were several parties hold of Adkins at the time, and after the defendant's revolver was taken away, he slipped around, and struck Adkins in the face with his fist. He thereupon turned away and went down the street, where he met the marshal, who arrested him for being drunk and disorderly.

There is no evidence in the record which shows or tends to show there had been any ill feeling between Adkins and the defendant previous to this time; and the testimony shows, without dispute, that no difficulty had theretofore occurred between them. It is reasonably clear, also, that neither the prosecuting witness nor the defendant knew that the other was in town until they met in front of Corab's saloon. It further appears that since the affray the parties have been on speaking terms, and, to use Adkins' own words, on one occasion at least, "drank out of the same bottle." There is no evidence tending to show that the defendant armed himself with a revolver for the purpose of assaulting Adkins at or before the time the difficulty occurred. On the contrary, the defendant's son, who came to town with him, testified that they brought the revolver to town in order to get some cartridges that would fit it, as they did not know its caliber. It would also seem from the testimony that if the defendant had not been drinking he would have had no difficulty with Adkins. That Adkins thought nothing of the matter is clear, because he made no complaint against the defendant, and only appeared and testified against him in obedience to a subpoena served on him for that purpose.

In the case of *Likens v. State*, *supra*, the assault was there made with a butcher knife. The prosecuting witness was slightly wounded, but the court held that the evidence was not sufficient to justify a conviction for assault with intent to inflict great bodily injury.

In the case of *Smith v. State*, 58 Neb. 531, the evidence tended to show that the accused saw the prosecuting witness driving some of his stock. He thereupon went home,

unhitched his team, hitched one of his horses to a road cart, in which he had placed a shotgun, jumped into the cart, and drove along the road after the parties who had the stock, until he overtook them, when he alighted from the cart, took therefrom the shotgun, and accosted Jenkins, who was along the highway behind the stock. The accused called Jenkins vile names, and demanded that the stock be released. He punched Jenkins on the legs and in the sides with the barrel of the gun. Jenkins took hold of the gun, and the accused struck him a number of times on the head and in the face. The court said: "The record before us discloses an aggravated assault and battery by him, but not an assault to do great bodily injury; hence the sentence must be reversed and the cause remanded."

The case of *People v. Lennon*, 71 Mich. 298, is an instructive one. In that case the court said:

"We find no evidence in the case warranting a conviction of the respondent of any greater offense than assault and battery. * * * Ryerse was not hit by a bullet, and there is no testimony showing that respondent meant to shoot him. Ryerse was not hurt, to speak of, and was more to blame than defendant. * * * There was testimony tending to show that there had been trouble for some time between the Ryerse family and Lennon. Lennon claimed that for a long time he had been the subject of many indignities and outrages on the part of Ryerse and his father, and others who were in league with them. * * * He therefore, on the morning of July 5, stopped Ryerse as he was passing his house, and expostulated with him; asked him, 'How long are you going to torment me in this way?' Ryerse gave him an insulting answer, which led to blows. Ryerse claims Lennon struck first, and the respondent swears that Ryerse assaulted him, backing him towards his gate, and 'punching' him in the face. Lennon testifies that he was sickly, and scared; that he considered his life in danger, as he was so weak that he felt that one good blow, 'the least thing in the world, would lay me out; it would knock me dead.' He claims he fired his

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pistol the first time to scare Ryerse, but, as Ryerse kept on afterwards following him-up and striking him, he struck Ryerse on the ear with the revolver, and it went off the second time accidentally. Whether Ryerse first assaulted Lennon or Lennon first struck Ryerse on this morning of July 5, is immaterial. At the best, Lennon was only guilty of assault and battery."

In the case at bar the evidence is insufficient to show, beyond a reasonable doubt, that when the defendant assaulted Adkins he had the intention to inflict upon him great bodily harm within the meaning of the statutes. It is true that he drew his revolver during the affray, and when he was getting the worst of the encounter, but before he could use it so as to endanger the life of Adkins it was wrested from him. So if he had formed, at that instant, an intent to inflict great bodily harm upon Adkins he neither had the means nor the present ability to carry out his intent. To our minds, the case made is one of ordinary assault and battery; and, being of opinion that the evidence does not sustain the verdict, it is unnecessary to consider any of the other errors assigned.

The judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

DANIEL MARTLEY ET AL., APPELLANTS, V. WILLIAM MARTLEY ET AL., APPELLEES.

FILED SEPTEMBER 21, 1906. No. 14,362.

WILLS: CONSTRUCTION. When there is an irreconcilable repugnancy between the clauses of a will, the later will prevail over the earlier. Such a repugnancy will not be raised by construction, but the instrument will, if possible, be so interpreted as to give effect to all its provisions.

APPEAL from the district court for Dodge county:
JAMES G. REEDER, JUDGE. *Reversed with directions.*

George L. Loomis, for appellants.

F. W. Button, *contra*.

AMES, C.

In 1882 William Martley died in Dodge county, in this state, the owner of a tract of land situate in that county, and leaving a will, afterwards duly admitted to probate, of which the following is a copy of so much as pertains to this litigation: "The property of which I am possessor, I bequeath in the following manner, to wit: I do give to my beloved wife, Catherine Martley, the one hundred and twenty acres which she shall possess during her life, and at her death shall revert to the children of whom we are father and mother, and in case she marries will only be entitled to her proper share, thus giving the children the sole control of their share. The personal property to be kept for the children except when it is necessary to be sold to pay expenses. I do hereby order that no part of my property, real estate or personal shall be given to my son, William, except one dollar which I do freely give him. The real estate is to be divided among the boys, William excepted." On the final settlement of the estate in 1883, the county judge entered an order adjudging the fee of the land to be, in equal parts, in four sons of the deceased, not including William, who was and is admitted to have been expressly excluded by the terms of the instrument. Several daughters of the testator and his wife Catherine also survived him, and the foregoing construction of the will by the county court seems to have been acquiesced in by all parties until shortly before the beginning of this suit, but the life tenant continued to occupy the premises, so that the sons named in the order have not entered into possession. In 1903 this action was begun by the four sons to quiet title in the fee of the land in themselves as against all the other heirs at law of the testator, who, it is alleged, are claiming ownership in the same as devisees

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under the will. The defendants, except William, who made default, answered by way of cross-bill, asserting such ownership. There was a reply which raised no essential issue, and there being no dispute of fact the cause was submitted to the court upon the pleadings, the object being to obtain a construction of the will. The district court adjudged that all the children of the testator who survived him, except William, acquired equal interests in the land as devisees.

The sole question is whether there is an irreconcilable repugnancy between the first and the last of the above quoted clauses of the will, it not being disputed or doubted that, if there is such, the last will prevail. *Griffin v. Pringle*, 56 Ala. 486; *Parks v. Kimes*, 100 Ind. 148; *Jordan v. Woodin*, 93 Ia. 453; *Covert v. Sebern*, 73 Ia. 564; *Davis v. Boggs*, 20 Ohio St. 550. To our minds, the question is one of such extreme doubt and obscurity that we are unable to solve it satisfactorily. It is a cardinal rule that repugnancy is not to be raised by construction, but the argument of counsel for defendants and appellees that there are no words of gift or devise in the last clause, but that such are to be found in the first clause only, by the terms of which, if it stood alone, the estate would have devolved in equal shares upon all the children, and that effect may be given to the last clause by supposing it to have been intended solely to emphasize the preceding exception of William, does not strike us convincingly. Technical words are not always of controlling force in the construction of a will, and there appears to us to have been no occasion for emphasizing the preceding sentence, which is free from ambiguity or the possibility of misinterpretation, and by which William is expressly excluded from all participation in the estate of the testator, except the nominal sum of \$1. Is it not at least equally or, rather, more probable that by the last clause the testator intended to except his daughters as well as William from participation in the land which was the family homestead? To confine the last clause to the mere office of emphasis is to give it

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no legal meaning at all, and to assign it to no obvious purpose or intent of the testator; but to suppose it to have been intended to express an exception, is at once to raise it to dignity and importance and to satisfy another elementary rule of testamentary construction, to wit, that every provision of the will shall, if possible, be given effect. On the whole, this view more nearly satisfies our minds than does that adopted by the learned trial judge, and we therefore recommend that the judgment of the district court be reversed and the cause remanded, with instructions to enter a decree in accordance with the prayer of the petition.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded, with instructions to enter a decree in accordance with the prayer of the petition.

JUDGMENT ACCORDINGLY.

RICHARD CLEVE, APPELLEE, v. CHICAGO, BURLINGTON &
QUINCY RAILWAY COMPANY, APPELLANT.

FILED SEPTEMBER 21, 1906. No. 14,408.

1. **Carriers: LIVE STOCK: BURDEN OF PROOF.** In an action to recover damages from a carrier for injury sustained by live stock in transit, which are accompanied by the owner or his agents, the burden is on the owner to show that the loss complained of was occasioned by the carrier's negligence.
2. ———: **DELAY IN SHIPMENT: EVIDENCE.** In order to recover damages for an alleged delay in the shipment of live stock, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport the shipment from the place where received to the point of delivery, and that a longer time was actually consumed than was necessary for that

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purpose. *Johnston v. Chicago, B. & Q. R. Co.*, 70 Neb. 364, followed and approved.

3. Evidence examined, and *held* insufficient to sustain the judgment of the trial court.

APPEAL from the district court for Otoe county: PAUL JESSEN, JUDGE. *Reversed.*

J. W. Dewcese, Frank E. Bishop and John C. Watson,
for appellant.

W. W. Wilson, contra.

OLDHAM, C.

This was an action for damages instituted by the plaintiff in the court below against the defendant railway company for the loss of two fat steers in the shipment of cattle from Nebraska City to Chicago. The cattle were shipped on the 8th day of August, 1899, and it was charged in the petition that the cattle died from overheat on account of delay in the shipment. Defendant's answer was in the nature of a general denial and plea of the statute of limitations. The cause was submitted to the court without the intervention of a jury, and at the close of the evidence judgment was entered for plaintiff. To reverse this judgment defendant appeals to this court.

Several alleged errors in the proceeding are called to our attention in the brief of the railway company, only one of which, however, it will be necessary to examine, in view of the conclusion about to be reached, and that one is that the evidence is not sufficient to sustain the judgment of the trial court. The testimony offered by plaintiff in the court below tended to show that on the 8th day of August, 1899, he shipped, under contracts entered into with the Burlington & Missouri River Railroad in Nebraska, eight carloads of stock from Nebraska City to Chicago. The stock were accompanied by two tenders during the entire shipment, and plaintiff himself accompanied the stock as far as Shenandoah, Iowa, at which point he took a passenger train to Chicago, the place of destination.

It appears from the testimony that the weather was hot when the shipment was made, but that all the stock were loaded in good condition, in suitable cars, properly bedded, at Nebraska City, at about 1 or 2 o'clock in the afternoon, on the day of the shipment. It further appears from the testimony that two stops were made between Nebraska City and Hamburg, Iowa, where the shipment was transferred from the branch to the main line of the road. Plaintiff and one of his tenders, McCarthy, testify that, when the train reached Hamburg, it remained on a side-track between two rows of box cars for about 30 or 40 minutes, and that the cattle became heated by reason of the fact that the box cars prevented the air from circulating through the stock cars. There is no competent evidence, however, that complaint was made either to the conductor of the train, or to the station agent, of this delay, nor is there any testimony that the delay was unnecessary and unusual. Plaintiff does say that he told the tenders to tell the conductor to move the train or the cattle would suffer from the heat. Mr. McCarthy, the only tender who testified, admitted that he did not notify the conductor of the train of the probable injury from this delay, or request him to move either the train or the box cars that impeded the circulation of the air. He thought, according to his testimony, that Mr. Cleve, the owner of the cattle, had entered complaint. On the other hand the conductor in charge of the train denied that any complaint was made to him of the delay at Hamburg, or that the delay there was unnecessary or for a longer time than was required to water and take on another car. It is shown in the evidence that one steer got down at Hamburg, and that this steer was dead when the train reached Stanton, about 7 o'clock in the evening. It is also in evidence that another steer got down near Stanton, and that this steer died shortly after the shipment was received in Chicago. There is no evidence in the record as to when the shipment, on schedule time, should have arrived in Chicago. Plaintiff, however, testified that it

was a slow shipment and stopped at all the stations, but there is no evidence that the stopping at each station was unnecessary or unusual in the transportation of live stock from Nebraska City to Chicago. There is no complaint of any failure to feed or water the cattle during the shipment, and it is admitted that the two attendants of the cattle were furnished with transportation by the company under the contracts of shipment. In fact, the cattle were shipped under three contracts, by consent of the agent of the defendant, in order that transportation might be furnished to plaintiff and his two tenders, who accompanied the cattle.

Now, the question arises as to whether or not this evidence is sufficient to show actionable negligence on the part of the defendant railway company. The authorities are not exactly uniform on the question as to whether or not the common law liabilities of carriers attach to railway and transportation companies in receiving and transmitting live stock. In Michigan it is held that a railway company is only required to transport live stock with reasonable diligence and to use ordinary care, prudence, and skill. *Heller v. Chicago & G. T. R. Co.*, 109 Mich. 53; *Sisson v. Cleveland & T. R. Co.*, 14 Mich 489. This rule appears to be favored in Kentucky and Tennessee. *Louisville & N. R. Co. v. Harned*, 23 Ky. Law Rep. 1651; *Baker & Stratton v. Louisville & N. R. Co.*, 10 Lea (Tenn.), 304. The clear weight of authority, however, is that in the transportation of live stock the liabilities of a common carrier attach, and this rule was adopted in this state in the early case of *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117, wherein it was held that, when the railway company undertakes to carry live stock for hire, it assumes all the duties and liabilities of a common carrier with reference to such property, and it is liable for injuries thereto occasioned by the negligence of its servants. The general rule of absolute liability of a common carrier for the safe delivery of property committed to it for carriage is qualified when applied to live stock, and

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made subject to the exception that it is not an insurer against injury resulting from the inherent nature or propensities of the animals, and without fault of the carrier. As to the presumption arising from loss or injury to stock while being transported by a common carrier, the authorities are at variance, one line holding that the presumption is that due care has been exercised by the carrier, and that the burden is on the plaintiff to show negligence on the part of the carrier. See *Crew v. St. Louis, K. & N. W. R. Co.*, 20 Fed. 87, and *Crandall v. Goodrich Transportation Co.*, 16 Fed. 75, and cases there cited. On the other hand, it has been held that, when loss or damages accrued during a shipment of live stock, the burden is upon the carrier to show that the cause of the loss or death was within the exceptions qualifying its general liability. *Moulton v. St. Paul, M. & M. R. Co.*, 31 Minn. 85, 16 N. W. 497; *Lindsley v. Chicago, M. & St. P. R. Co.*, 36 Minn. 539; *Burke v. United States Express Co.*, 87 Ill. App. 505; *Nelson v. Great Northern R. Co.*, 28 Mont. 297, 72 Pac. 642; *Ft. Worth & D. C. R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; 5 Thompson, Commentaries, Law of Negligence, sec. 6576.

While the weight of American authority seems to favor the rule that in cases involving loss or injury to animals during transit the carrier has the burden of showing that the injury was occasioned without its fault, yet a distinction is made between live stock committed exclusively to the care of a common carrier and live stock shipped under a contract by which the owner, in person, or by his employees, accompanies the stock for the purpose of caring for them during transit. This distinction has been recognized by this court in the case of *Chicago, B. & Q. R. Co. v. Williams*, 61 Neb. 608, in which it was held that, where the shipper of stock does not agree to furnish a caretaker and some of the animals die, or are injured for want of care or protection in transit, the carrier must bear the loss. In rendering this opinion, it was said by SULLIVAN, J., "that the rule is not doubted that, where the owner

is in charge of live stock in transit, the burden is on him to show a loss caused by the carrier's negligence." In the still later case of *Chicago, St. P., M. & O. R. Co. v. Schuldt*, 66 Neb. 43, the above quotation was cited with approval, and it was further held that common carriers of live stock have a right to limit by contract the assumption of liability that accrues to them merely as bailees, and not strictly as common carriers. We think these cases establish the rule in this jurisdiction that, where by contract the shipper accompanies his live stock with tenders or caretakers, no presumption of negligence on the part of the carrier arises merely from the proof of the fact that loss or injury has attended the shipment, but the burden is on the shipper to show that the loss, if any, sustained was occasioned by the negligence of the carrier. Now, the only negligence alleged against the carrier in the case at bar is that of delay in the shipment. In the case of *Johnston v. Chicago, B. & Q. R. Co.*, 70 Neb. 364, the rule was laid down that, "in order to recover damages for an alleged delay in the shipment of live stock, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport the shipment from the place where received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose."

We think, under this rule, the evidence introduced was wholly insufficient to sustain the judgment, and we therefore recommend that the judgment of the district court be reversed and the cause be remanded for further proceedings.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

WILLIAM R. STARR, APPELLANT, v. CHESTER W. DOW ET AL., APPELLEES.

FILED SEPTEMBER 21, 1906. No. 14,413.

1. **Conditional Sales: VALIDITY.** A contract for the sale and delivery of personal property upon condition that the title is to remain in the vendor until the purchase price is paid, is invalid, as against purchasers in good faith, judgment and attaching creditors of the vendee, without notice, unless a copy of the contract is verified and filed in the manner pointed out in section 26, ch. 32, Comp. St. 1903. *Peterson v. Tufts*, 34 Neb. 8, followed and approved.
2. **Bill of Sale: VALIDITY.** A bill of sale received in payment of an antecedent debt protects the vendee to the same extent as had there been a new consideration, if taken in good faith and without an intention to defraud the other creditors of the vendor. *Rachman v. Clapp*, 50 Neb. 648, followed and approved.

APPEAL from the district court for Red Willow county:
ROBERT C. ORR, JUDGE. *Reversed.*

Boyle & Eldred, Fayette I. Foss and Starr & Reeder, for appellant.

W. S. Morlan, contra.

OLDHAM, C.

This was an action in replevin, originally instituted before a justice of the peace in Red Willow county, to recover the possession of a number of crated buggies and spring wagons. The cause was appealed to the district court where, on a trial had to the court and jury, a verdict was directed for the defendant, and judgment entered on the verdict. To reverse this judgment the plaintiff has appealed to this court.

Plaintiff claims title to the property in dispute under a bill of sale executed and delivered to him by James McClung on the 10th day of October, 1903, and filed for record on the 12th day of October, 1903. Defendant Van

Brunt claimed title under an unrecorded contract of conditional sale with McClung. The evidence shows that for some time before the 10th day of October, 1903, McClung had been engaged in selling wagons and buggies in Indianola, Nebraska, and that the vehicles in dispute had been purchased under contract from the defendant, Henry H. Van Brunt, a wholesaler and jobber doing business in Council Bluffs, Iowa; that after disposing of a number of the wagons and buggies purchased under this contract, McClung quit business, and went to Denver, Colorado, for treatment in a Keeley institute; that on his way to Denver he stopped at McCook, and had a settlement with his attorney (who is plaintiff in this cause) for legal services rendered during a period of about 16 years and for money loaned to him during that period by his attorney; that in this settlement plaintiff was retained for further services in behalf of McClung's daughter in a cause then pending; that in settlement for these services McClung executed and delivered to plaintiff a bill of sale on the vehicles in dispute as well as on other property. Plaintiff testified that at the time he received the bill of sale McClung told him that he was not in debt to anyone, and that he had no knowledge of defendant's claim against McClung for the purchase price of these vehicles. Afterwards defendant's agent came to Indianola, and took possession of the vehicles and stored them in a warehouse owned by defendant Dow, where they remained until this action was instituted.

It appears from the testimony that, before the purchase of the goods in dispute, McClung had been dealing for some time with the McCormick Harvester Company, and that on information which defendant obtained from that company he extended credit to McClung for four and six months on the goods consigned, and that at the time the bill of sale was made to plaintiff payment was not due on the contract under the credit extended. There is no testimony whatever in the record of any fraud having been perpetrated on defendant in the purchase of the goods or in

procuring the credit extended on them. As before stated, the contract of conditional sale was never filed for record, so that the question for consideration is well stated in the brief of the appellee, wherein it is said: "The case involves but a single issue and that a very simple one: Was the appellant a *bona fide* purchaser of the property which is the subject of controversy?"

The only evidence introduced on the question of the *bona fides* of the purchase was that of plaintiff himself, and he testified that McClung was in debt to him for services and borrowed money in an amount in excess of \$400, the price named in the bill of sale, and that he took the bill of sale in satisfaction of all claims against McClung for services already rendered as well as those to be rendered on behalf of his daughter in the suit then pending, which services, he says, were subsequently rendered. In *Peterson v. Tufts*, 34 Neb. 8, it was said:

"A contract for the sale and delivery of personal property upon condition that the title is to remain in the vendor until the purchase price is paid, is invalid, as against purchasers in good faith, judgment and attaching creditors of the vendee, without notice, unless a copy of the contract is verified and filed in the manner pointed out in section 26, ch. 32, Comp. St. 1891."

While it is true that the testimony of plaintiff as to the items which constituted his claim against McClung is neither so clear nor so convincing as to remove all suspicion concerning the good faith of the transaction, yet, in our view, there was sufficient evidence to warrant the submission of this issue to a jury under proper instructions. Since there is no proof of fraud in originally procuring the goods from the defendant Van Brunt, and, as this court has said in *Rachman v. Clapp*, 50 Neb. 648, "A bill of sale received in payment of an antecedent debt protects the vendee to the same extent as had there been a new consideration, if taken in good faith and without an intention to defraud the other creditors of the vendor," we think the question of the *bona fides* of the sale was one

of fact for the jury, and we therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings.

REVERSED.

MIRAGE IRRIGATION COMPANY; APPELLEE, v. ELMER E.
STURGEON, APPELLANT.

FILED SEPTEMBER 21, 1906. No. 14,422.

1. Evidence examined, and held sufficient to sustain the judgment.
2. Case Distinguished. *Enterprise Ditch Co. v. Moffitt*, 58 Neb. 642, examined and distinguished.

APPEAL from the district court for Sheridan county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

O. Patterson and A. W. Crites, for appellant.

W. W. Wood, contra.

OLDHAM, C.

This is a controversy between the plaintiff, a corporation organized under the laws of Nebraska for the purpose of constructing and operating an irrigation canal in Sheridan and Dawes counties, and the defendant, who is a stockholder and director in the corporation. In December, 1900, the plaintiff was in debt for construction work on its canal in the sum of \$2,643 and without funds to meet the indebtedness, and on the 29th day of that month, at a regular meeting of the board of directors, an assessment of 10 per cent. on the face value of all the stock was

levied by the board of directors. The defendant was a member of the board and participated in the meeting which made the levy. The stock seems to have been fully paid up at the time this additional levy was made, and defendant was the owner of 35 shares of the capital stock. His certificate of stock, at the time of the purchase, contained the following recital: "This certificate of stock is issued and accepted on the further condition indorsed on the back of this certificate." And on the back of the certificate was the following indorsement: "This stock is subject to assessment over and above its par value, for maintenance of the canal, and may be sold for all delinquent assessments so levied." When this assessment was made, defendant had a claim against the corporation for \$150 for construction work on the canal. The assessment of 10 per cent. on his stock was charged against him on the books of the company in the sum of \$356.13, and he was given credit for the \$150 due him for his work. On April 27, 1901, at a session of the board of directors, at which defendant was present, it was agreed between plaintiff and defendant that his assessment should be paid by the \$150 due him on the books and his agreement to pay the balance of \$206.13 on a note, which had been given by the plaintiff to one Thomas Cuff, and which was then in the hands of DeLoss Barber for collection. Under this agreement defendant was credited for the full amount of his assessment on the books of the company and gave the following receipt to plaintiff: "Hay Springs, Neb., Apr. 27, 1901. Rec'd of Mirage Irrigation Co. Two Hundred Six & 13-100 Dollars to be credited on Cuff note. \$206.13. (Signed) E. E. Sturgeon." After the execution and delivery of this receipt, defendant refused and neglected to make any payment on the Cuff note, and the company was compelled to pay it in full. It thereupon brought the case at bar in the county court of Sheridan county to recover from defendant the \$206.13 and interest. The case was tried in the county court, and taken by appeal to the district court for Sheridan county, where

a jury was waived and trial had to the court, which resulted in a judgment for the plaintiff. To reverse this judgment defendant has appealed to this court.

Defendant's sole contention is that the assessment on the paid-up capital stock was absolutely void, and that his agreement to settle the same with the board of directors was a mere *nudum pactum*. The general rule is that a corporation cannot levy an assessment upon the holders of fully paid-up stock, unless the power to do so is conferred by the charter, or articles of association, or a valid statute, or by consent of the stockholders or members. 2 Clark and Marshall, Private Corporations, sec. 402. In the case at bar the assessment was made by consent of all the directors present, defendant being one of them, and was done in conformity with the provisions contained in the stock certificates at the time they were purchased by the defendant. The case of *Enterprise Ditch Co. v. Moffitt*, 58 Neb. 642, relied upon by defendant, is not in conflict with the conclusion about to be reached, because in that case there was no by-law or provision of the articles of incorporation at the time the stock was issued and purchased which provided for a levy on the fully paid-up capital stock. And it was properly held in that case that a retroactive by-law of this nature could not be passed which would operate on stock issued before its enactment. The facts in the case at bar clearly take it without the rule in that case.

We are therefore of opinion that the evidence is sufficient to sustain the judgment of the trial court, and we recommend that its judgment be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ANDREW RAMOLD V. EDGAR CLAYTON.

FILED SEPTEMBER 21, 1906. No. 14,230.

Review: HARMLESS ERROR. When the verdict returned by the jury is the only one justified by the evidence, errors in the giving and refusing of instructions are not prejudicial.

ERROR to the district court for Otoe county: PAUL JESSEN, JUDGE. *Affirmed.*

John V. Morgan and Roddy & Bischof, for plaintiff in error.

L. F. Jackson, contra.

EPPERSON, C.

Defendant is the owner of a farm in Otoe county. Camp creek, a natural watercourse, flows through his premises. Plaintiff is the owner of a tract of land lying about 80 rods south of defendant's said farm. Plaintiff alleged that in May, 1903, defendant diverted the waters of Camp creek by the construction of dikes so as to cause them to flow upon his premises to his damage. Defendant denied the illegal construction and maintenance of the dams, and alleged that the overflow on plaintiff's land was in no way due to the acts of the defendant, but was due to an unprecedented flood in the month of May, 1903. The cause was tried in the district court for Otoe county, and a verdict returned for defendant.

One of the instructions given to the jury, which plaintiff now assigns as error, is as follows: "You are instructed that the uncontradicted evidence in this case shows that after the rain on the afternoon of May 26, 1903, the flood waters of Camp creek were over both the east and the west dikes along the banks of said creek, at the point in said creek where the dam built in April, 1903, formerly stood.

And so far as the alleged damages to plaintiff's land and crops from the flood waters resulting directly from this particular rain the defendant would not be liable." An examination of the evidence convinces us that this instruction was correct. It is undisputed that at the time of this unprecedented flood the banks of Camp creek did not confine the waters thereof, and that the dams and embankments constructed by defendant in no way contributed to the volume of water that was then thrown upon plaintiff's land, but, on the contrary, were swept away by the torrent. The undisputed evidence shows that this flood of May 26 was very destructive. The plaintiff's corn crop was almost entirely destroyed. One of his neighbors with difficulty rescued his cattle from drowning. A bridge over Camp creek, above the dams complained of, was carried several rods, and away from the channel of the stream. Some witnesses say that dikes ten feet high would not have withstood the flood waters. Property which in no way could have been affected by the alleged acts of the defendant was destroyed. The evidence shows that the rainfall in that vicinity in May, 1903, varied from one-half of an inch to an inch on several different dates until May 26, when occurred the extraordinary flood referred to above. It is not shown that plaintiff was damaged, as alleged in his petition, except by this extraordinary flood. The only evidence indicating that the acts of the defendant caused the water to flow from Camp creek at any other time upon plaintiff's land appears in the testimony of plaintiff himself. He testified as to dams and dikes constructed by the defendant, and said that upon every little rain the water came to and upon his land from Camp creek; but the evidence does not show that such diversion of the water damaged either his crops or his land. For this reason, no other judgment than the one rendered could have been sustained by the evidence. It is a rule well established that, when the verdict returned is the only one justified by the evidence, errors in the giving or refusal of instructions are not prejudicial.

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We therefore recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

SARAH A. GRIFFITH, APPELLEE, v. WILLIAM E. GRIFFITH,
APPELLANT.

FILED SEPTEMBER 22, 1906. No. 14,417.

1. **Divorce: EVIDENCE.** Continued threats of personal violence indulged in by a husband toward his wife, and accusations of crime and the use of profane language, such as is described in the opinion, held sufficient to support the wife's petition for a divorce on the grounds of cruelty.
2. **The condonation of a wife's wrongs, not subsequently repeated,** will bar the husband from obtaining a divorce therefor.

APPEAL from the district court for Richardson county:
ALBERT H. BABCOCK, JUDGE. *Affirmed.*

Reavis & Reavis, for appellant.

Francis Martin, contra.

EPPERSON, C.

The plaintiff, Sarah A. Griffith, brought this action in the district court for Richardson county to obtain a divorce from her husband, William E. Griffith, alleging as a ground therefor that defendant had been guilty of extreme cruelty toward her. Defendant answered, denied the acts of cruelty, and by way of cross-petition alleged that plaintiff had been guilty of adultery on several occasions, and prayed for a divorce on that ground. The lower

court found for the plaintiff, entered a decree of divorce as prayed in the petition, and dismissed defendant's cross-bill, and allowed the plaintiff alimony which, if she is entitled to recover, is conceded to be reasonable. Defendant appeals to this court and contends: (1) That the decree in plaintiff's favor is not sustained by the evidence; (2) that the proof conclusively shows that plaintiff was guilty of infidelity as alleged in the cross-petition.

1. The evidence offered in support of plaintiff's petition was to the effect that defendant often cursed plaintiff, frequently came home intoxicated, and by insinuating and profane language accused her of having wrongfully entertained men at their home during his absence; that he often told her he did not care for her, threatened to break her head open, and made other threats of personal violence; accused her of having a bad disease; that he did nothing toward making her life enjoyable. Such it appears has been his conduct to a greater or less extent since their marriage in 1888, increasing, as time advanced, in the display of anger, jealousy and making of threats, until the plaintiff, through fear of her husband, left his home, and soon thereafter instituted this suit. This evidence is denied by the defendant; but plaintiff's testimony was corroborated, and we consider that the proof supported plaintiff's petition, and showed that the conduct of defendant was so abusive that the legitimate ends and objects of matrimony were destroyed, and that the decree of the trial court should be affirmed, unless the proof discloses that plaintiff committed adultery as alleged in the cross-petition, and that such acts, if proven, were not connived at or condoned by the defendant.

2. Defendant introduced testimony which he claims was sufficient proof of plaintiff's guilt on at least three occasions with three different men. Counsel for defendant cannot successfully contend, in view of the denial of the wife and the finding of the district court on conflicting evidence, that the proof conclusively shows that plaintiff was guilty of adultery with two of these parties. It is,

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however, earnestly contended that the evidence proves the charge made against the plaintiff and one Hammontree, and that the judgment below should, therefore, be reversed, and a decree of divorce ordered for defendant. Hammontree was unmarried and about 22 years of age. In the summer and fall of 1902 he was employed by Griffith as a farm hand, and during that time lived with defendant and his wife on their farm in Richardson county. There was a letter introduced in evidence, written by plaintiff in June, 1903, addressed to Hammontree, who then lived in Missouri, containing many affectionate terms, and lascivious throughout. The general import of it is so vile that this opinion will not be polluted with its reproduction, and yet in this letter there is no direct reference to any former illicit relations between the parties, but by insinuation we must reach the conclusion, either that illicit relations had been sustained during the time Hammontree was residing with defendant's family, or that plaintiff desired to inform Hammontree of her lascivious disposition that he might be induced to return to the employ of the plaintiff's husband. The evidence at least showed a disposition on the part of the plaintiff to commit adultery, and further, that such was her disposition when her alleged paramour was residing in the family. The proof discloses that at such time, and during the absence of the husband, the opportunity existed for such illicit relations, but the credible evidence falls short of showing a disposition on the part of young Hammontree to indulge in such relations. We consider it unnecessary, in our view of the case, to determine whether or not the defendant's charge of adultery is true. If true, then by his own conduct he condoned the offense. He testified that at one time he discovered his wife and Hammontree in a position which would be sufficient to convince a husband of ordinary intelligence that his wife and Hammontree were sustaining improper relations. He also testified to compromising circumstances in her conduct toward other men, and these facts, he testified, convinced him at the time that his wife

had been guilty of adultery with these different men, but it seems that the defendant attached but little importance to these matters. He says: "Q. You felt in your soul that she was guilty? A. Yes, sir. Q. Yet you continued to live with her as your wife? A. Yes, sir. Q. You didn't think it amounted to much or made much difference if she was unfaithful to you, did you? A. I suppose those things ought to be overlooked * * * Q. You were perfectly willing to overlook all those things and take her back to your bosom again, wasn't you? A. Yes, sir." The evidence further shows, and it is admitted by defendant, that several months prior to the separation of these parties the defendant desired to employ an unmarried man to do farm work and to bring him to their home; that the plaintiff positively refused to cook for an unmarried man, giving as her reason that her husband was always suspicious of single men and made false accusations against her. On one occasion, after defendant had seen conduct which he now says convinced him of his wife's infidelity in her relations with an employee, he continued the employment and permitted the young man to remain, as before, a member of the family. Thus we find that the husband, believing his wife unfaithful, continued the relationship of husband and wife, and permitted the man whom he believed to be his wife's paramour to remain in his household where there were many opportunities for illicit relations. He further testified: "Q. You were willing to overlook the things you complain of now if she only would be good in the future, is that it? A. Yes, sir." The evidence fails to disclose that after such condonation his wife continued to be unfaithful. The marriage relations were continued. Having thus condoned his wife's transgressions, the defendant is not in a position to now obtain a divorce for these reasons. As was said by Parsons, C. J., in (*anonymous*) 6 Mass. *147 (quoted in 2 Bishop, Marriage, Divorce and Separation, sec 285): "It would be injustice to the wife, and immoral in the husband, to claim and enjoy, as his peculiar marital rights, the society of his wife, after a

knowledge of her offense, and afterwards to cast her off for that same offense." The condonation established the marital relations existing between the parties, restoring to the erring wife all rights to the respect and protection of the husband, the same as it was prior to the commission of the wrong; and, unless wrongs of the same nature are again committed, the condonation will operate to bar the husband from alleging them against her.

Plaintiff herein did not plead condonation, nor did she offer evidence to prove it. The absence of such a plea on her part, however, does not prevent the court from considering the same. It appeared from the defendant's own testimony that, were these charges of infidelity true, he had condoned them, and under such circumstances the court will of its own motion consider such facts in its decision of the case. In 2 Bishop, Marriage, Divorce and Separation, sec. 631, it is said: "By reason of the suit being triangular, and the public being a party to it, a fact of condonation appearing is fatal to the plaintiff's claim, though the defendant has not pleaded it; not because the latter has any just right to take the objection, but because public policy does not permit the divorce. And the public, which does not plead, objects through the conscience of the judge. Chancellor Walworth went so far as to say that if there is reason to believe this defense exists, the court, *ex officio*, may at any time before a final decree direct an inquiry to ascertain the fact." Nor does the husband's condonation exempt him from liability in an action for divorce founded on his own wrongs. It is not the sense of this opinion to approve in any way the deplorable conduct of the wife shown by the evidence, but a court of justice cannot refuse relief to one simply because the evidence raises a strong presumption, or even proves, that such an one formerly indulged in sin and crime.

We are of opinion that the defendant is in no position to urge to a court of equity the infidelity of the plaintiff, and we recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GORDON BROTHERS V. FRANK E. WAGEMAN.

FILED SEPTEMBER 21, 1906. No. 14,285.

1. **Constitutional Law: EXEMPTIONS: WAGES.** The act of 1889 for the better protection of the earnings of certain employees (secs. 531c-531f of the code), makes it "unlawful for any creditor of, or other holder of any evidence of debt, book account, or claim of any name or nature" against a certain class of employees to assign, or by any means dispose of, such claim, or to institute or prosecute in this state or elsewhere any action thereon by any process seeking to seize, attach or garnish the wages of such employees earned within 60 days prior to the commencement of such proceeding, for the purpose of avoiding the effect of the exemption laws of the state, and provides that any one violating the act shall be liable to the party injured through such violation "for the amount of the debt sold, assigned, transferred, garnished, or sued upon, with all costs and expenses and a reasonable attorney's fee," and be subject to criminal prosecution. *Held*, Constitutional, following *Singer Mfg. Co. v. Fleming*, 39 Neb. 679; *Bishop v. Middleton*, 43 Neb. 10.
2. **Claim Defined.** A claim is a demand made of a right or supposed right calling on another for something due or supposed to be due. It implies that the right is in dispute and is suggestive of debate, contention and of something left for future determination. An account which one claims to hold against an employee is an account or claim within the meaning of said act.
3. **Assignment of Claim: ACTION.** In an action brought against a creditor under the foregoing provisions, the plaintiff alleged and proved that the defendant claimed to hold an account against him; that the defendant assigned such account to some person unknown to the plaintiff; that thereafter suit was instituted thereon in another state by a certain party other than the defendant claiming to own the account; that in said suit the exempt wages of the plaintiff were attached for the satisfaction of said account. *Held*, Sufficient to make a *prima facie* case under the provisions of section 531e, and this is true although the process under which the wages were attached was irregularly issued and served.

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4. Judgment of Justice's Court: AUTHENTICATION. A transcript of a justice of the peace to be receivable in evidence need not be authenticated in accordance with the provisions of section 414 of the code which relates to judgments of courts of record. It is receivable in evidence if it conforms to the requirements of section 415 which relates specifically to judgments of justices of the peace of another state.

5. Evidence examined, and held sufficient to sustain the verdict.

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

Charles O. Whedon, for plaintiff in error.

Guile & Guile, contra.

ALBERT, C.

This action is grounded on the act of 1889 (laws 1889, ch. 25), entitled "An act to provide for the better protection of the earnings of laborers, servants, and other employees of corporations, firms, or individuals engaged in interstate business," which constitutes sections 531c-531f of the code. The act makes it "unlawful for any creditor of, or other holder of any evidence of debt, book account, or claim of any name or nature" against any such employee to assign, or by any means dispose of, his claim or debt, or to institute or prosecute in this state or elsewhere any action upon such claim or debt by any process seeking "to seize, attach, or garnish the wages of such person or persons earned within 60 days prior to the commencement of such proceedings, for the purpose of avoiding the effect of the laws of the state of Nebraska concerning exemptions." It further provides that any one violating the act "shall be liable to the party injured through such violation of this act, for the amount of the debt sold, assigned, transferred, garnished, or sued upon, with all costs and expenses and a reasonable attorney's fee," and to criminal prosecution and fine. The petition, omitting the formal parts, is as follows: "Comes now the plaintiff, and for

his cause of action against the defendant alleges that the defendant is a partnership formed for the purpose of trade and doing business in the county of Lancaster, state of Nebraska; that plaintiff is a resident of Havelock, Nebraska, the head of a family, and a mechanic employed by the Chicago, Burlington & Quincy Railway Company, a corporation engaged in interstate commerce; that the defendant herein, claiming to have an account of indebtedness against this plaintiff for the sum of \$21.14, did on or about the 1st day of February, 1904, assign said alleged account of indebtedness to some person, firm, or corporation unknown to this plaintiff in violation of, and for the purpose of, evading the laws of the state of Nebraska; that on the third day of February, 1904, one G. Leudtke instituted garnishment proceedings before A. J. Liddil, a justice of the peace in and for Jackson county, Missouri, to collect from this plaintiff the amount claimed to be due on the alleged account of indebtedness unlawfully assigned by defendant, and interest, and that wages earned by plaintiff and in the hands of the Chicago, Burlington & Quincy Railway Company were garnished, seized and applied to the payment of the alleged account of indebtedness, interest and costs; that the wages garnished and seized as aforesaid were exempt to this plaintiff, and earned less than 60 days prior to the institution of the garnishment proceedings instituted by the aforesaid G. Luedtke before A. J. Liddil, a justice of the peace in and for Jackson county, Missouri; that the amount of wages garnished and seized as aforesaid is \$32.37, which amount, together with \$100 attorney's fee, plaintiff seeks to recover of defendant. Plaintiff, therefore, prays judgment against the defendant for the said sums of money, amounting in all to the sum of \$132.37, together with costs of this action." A general demurrer interposed to the petition was overruled, whereupon the defendant answered denying generally all the allegations of the petition. The verdict was for plaintiff, and judgment went accordingly. The defendant brings error.

It is first contended that the petition fails to state a cause of action, and consequently that the court erred in overruling the defendant's demurrer. The omissions relied upon as sustaining this contention are: (1) That the defendant was a creditor or a holder of some evidence of indebtedness, book account or claim against the plaintiff; (2) That the defendant assigned or transferred its claim, for the purpose of avoiding the effect of the laws of the state of Nebraska concerning exemptions; (3) that the said claim had been assigned to Luedtke, the party who instituted the proceedings in garnishment in Missouri, or that he was the holder thereof or had any interest therein; (4) that the justice of the peace before whom such proceedings were instituted had jurisdiction of the subject matter.

As to the first, it seems to be without substantial merit. The statute covers claims of every name and nature. The word "claim" is defined by Webster as "A demand made of a right or supposed right; calling on another for something due or supposed to be due, as a claim for wages or services." It implies that the right is in dispute, and is suggestive of contention, litigation and something left for future determination. *Prigg v. Pennsylvania*, 41 U. S. 539. Consequently, the allegation "that the defendant herein claimed to have an account," etc., is equivalent to a charge that it had a claim of some nature against the plaintiff.

As to the second, while the petition does not specifically charge the defendant with having assigned such claim for the purpose of avoiding the effect of the laws of the state of Nebraska concerning exemptions, it does charge that such assignment was made for the purpose of evading the laws of the state of Nebraska. The greater includes the less. If the defendant desired a more specific statement in this regard, the remedy was by motion.

As to the third, it is more substantial, and we were at first disposed to hold that it was vital. But section 531e of the code is as follows: "In any proceeding, civil or criminal, growing out of a breach of sections one or two of

this act, proof of the institution of a suit, or service of garnishment summons, by any person, firm, or individual, in any court of any state or territory other than this state, or in this state, to seize by process of garnishment, or otherwise, any of the wages of such persons as defined in section one of this act, shall be deemed *prima facie* evidence of an evasion of the laws of the state of Nebraska and a breach of the provisions of this act on the part of the creditor or resident in Nebraska causing the same to be done." The preceding section makes it unlawful for any person or persons to aid, assist, abet, or counsel a violation of this act for any purpose whatever. Taking into account the entire act, its remedial character and the nature of the transactions against which it is leveled, it is thought it was the intention of the legislature to make the acts enumerated in section 531e *prima facie* evidence of a violation of the statute on the part of the original creditor, every subsequent holder of the claim, and all other persons. This construction is not unreasonable, and imposes no great hardship upon the original creditor or a subsequent holder of the claim. Where a disposition of the claim is made in good faith, and without any intention on the part of the creditor to evade the exemption laws of the state, those facts may be shown to rebut the presumption arising under the statute. This construction appears to have been placed upon the statute early in its history. See *Bishop v. Middleton*, 43 Neb. 10. It is true it opens the door to the practice of imposition upon creditors and the holders of such claims, as it enables unauthorized persons to do certain acts without their knowledge and consent, by which a *prima facie* case may be made against them. But the same may be said of the presumption often said to arise from the recent possessions of stolen property. In defense of both these presumptions, it may be said, experience has taught that the general good resulting from their indulgence far outweighs any occasional individual hardship. Adopting this construction, it was not necessary for the plaintiff to charge that the defendant

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had assigned the claim to Leudtke, or that his title thereto was traceable to the defendant, because the fact that suit had been instituted thereon in another state whereby the exempt wages of the plaintiff had been seized raises a presumption of a violation of the act, and, as was said in *Bishop v. Middleton, supra*, "It is not necessary to plead what the law presumes."

The fourth criticism, namely, that the petition contains no allegation that the justice of the peace in Missouri had jurisdiction also appears to be unfounded. The petition shows the institution of the garnishment proceedings in another state whereby the exempt wages of the plaintiff were seized. The amount of the claim is within the jurisdiction of a justice of the peace in this state, and, in the absence of a showing to the contrary, the presumption is that it was also within the jurisdiction of the justice of the peace in Missouri. In short, the petition shows that the very acts prohibited by the statute, and which, when established, make a *prima facie* case against the defendant, were done, and consequent damages. That is all that is required.

The plaintiff offered in evidence what purports to be a transcript of the proceedings had before the justice of the peace in Missouri in the case brought against him there by Leudtke. The certificate of the justice in due form is attached thereto, which is followed by another certificate which is as follows: "State of Missouri, County of Jackson, ss: I, J. L. Phelps, clerk of the county court within and for the county and state aforesaid, the same being a court of record, and having a seal, do hereby certify that A. J. Liddil, who has signed the foregoing instrument, was at the date thereof a justice of the peace within and for Blue township, in the county of Jackson, and duly commissioned to act as such, and that I am well acquainted with his handwriting, and I verily believe the signature thereto to be genuine. In witness whereof I have hereunto set my hand and affixed the (seal) seal of said court at Kansas City, Mo. this 15th day of June, 1904. Jas. L.

Phelps, Clerk, F. J. Kast, Deputy Clerk." The defendant objected to the reception of the evidence on the ground that it was not duly authenticated. The objection was overruled, and this ruling was assigned as error. The argument upon this assignment is based on sec. 414 of the code, which prescribes the manner in which judgments of of a court of record of a sister state shall be authenticated. But the specific provision for the authentication of a judgment of a justice of the peace of another state is in the next section; hence, the argument upon this point is beside the mark. The authentication appears to conform substantially to the latter section and is sufficient we think.

It is also claimed that the transcript is insufficient to show the institution of the garnishment proceedings before the justice of the peace in Missouri because the service of the notice in garnishment appears to have been made by a "deputy constable" who appears to have served it by "declaring to the Chicago, Burlington & Quincy Railway Company," plaintiff's debtor, that it was summoned as garnishee in said proceeding. Section 531e enumerates the acts which, when proved, shall be deemed *prima facie* evidence of a violation of the act in question. Among those acts are "proof of the institution of a suit, or service of garnishment summons, by any person, firm, or individual, in any court of any state or territory other than this state." There the distinction is made between the institution of a suit and the service of process. Where the suit is instituted, and where by process, however defectively served, the exempt wages are seized, as they were in this case, the presumption of a violation of the act arises. It would be a travesty on justice to permit a party to invoke the aid of a court in another state, and by such aid seize exempt wages, and then come in and defend against a violation of the act by showing some irregularity in the service of the process of the foreign court. The suit was instituted before the justice of the peace and was effective for the purpose for which it was instituted. That being true, proof that the suit was instituted makes a *prima facie* case

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against the defendant. The defendant offered no testimony. That adduced by the plaintiff is abundantly sufficient to sustain the verdict.

The constitutionality of the act under which this suit was brought is vigorously assailed by the defendant. It was thus assailed in *Singer Mfg. Co. v. Fleming*, 39 Neb. 679, and *Bishop v. Middleton*, *supra*. It was upheld in the former in an exhaustive opinion, which was adhered to in the latter. We are satisfied with the conclusion reached in those cases and regard the question as settled. The act has been in operation for more than 15 years and, while it has been characterized as harsh and oppressive, yet no case has come under our notice, and we doubt if one can be found, where any person, innocent of an intention to evade the law, has suffered from its provisions. It has proved a wise and salutary piece of legislation, without which the law exempting wages from seizure by attachment or on execution would afford little or no protection to a large class of wage earners.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

DE LAVAL SEPARATOR COMPANY, APPELLEE, v. FRANK
JELINEK, JR., APPELLANT.

FILED OCTOBER 4, 1906. No. 14,370.

Contract: WRITTEN MEMORANDUM: EVIDENCE. If a written memorandum confirmatory of a previous oral agreement does not purport to recite the whole of the latter, oral testimony is admissible to supply omitted covenants not inconsistent with the writing.

APPEAL from the district court for Saline county: LESLIE G. HURD, JUDGE. *Reversed.*

F. I. Foss and R. D. Brown, for appellant.

M. H. Fleming, contra.

AMES, C.

The petition alleges that the plaintiff and defendant entered into a written contract, a copy of which is annexed to the pleading, by which the plaintiff agreed to furnish to the defendant certain machines to be sold by the latter within certain territory in this state, and the proceeds of such sales accounted and paid for at the prices specified in the agreement; and that the plaintiff had furnished to the defendant a certain number of such machines pursuant to the contract, for a part of which, aggregating in price \$340.90, he had failed and refused to account for or pay, and for which amount and costs the plaintiff prayed judgment.

The defendant answered, admitting that the plaintiff had furnished to the defendant such machines to be sold by him within the territory described, and to be accounted and paid for at the prices named, and that the plaintiff had furnished the number stated in the petition, and that for the number so furnished, aggregating in price \$340.90, the defendant had not paid. But the defendant averred that the written document was not the contract under which the said machines were furnished by the plaintiff and received by the defendant, but only a memorandum of a part of said contract; that the contract was oral, and was entered into by and between the defendant and an agent of the plaintiff at a time prior to the making of the written memorandum, and contained stipulations or covenants not embodied or intended by either of the parties to be embodied in the writing; the sole purpose of the latter being to describe the character of the plaintiff's employment and the territory in which he was employed

to sell the machines, and the prices at which he should sell and account and pay for the same, but that the oral agreement stipulated that the defendant should have the exclusive right to make such sales within the territory named for so long a time as such arrangement should be satisfactory to both parties thereto, which stipulation was not contained in the writing. The defendant further alleged that, pursuant to such agreement, he had expended a large amount of time and money in promoting sales of such machines within the prescribed territory, and in negotiating such sales to be thereafter consummated, and that said employment had at all times been satisfactory to both parties to said agreement, and the plaintiff had not at any time expressed dissatisfaction therewith or had reason so to do, but that the plaintiff had nevertheless arbitrarily and unjustifiably put an end to such employment, at some time previous to the bringing of the action, and had since said time refused to furnish said machines to the defendant for sale, but had furnished them exclusively to another person for sale in the prescribed territory, to the damage of the defendant in the sum of \$2,000, for which sum the defendant prayed judgment by way of counterclaim or set-off.

When the plaintiff had rested its case, the defendant offered to prove the matters pleaded as a counterclaim, but the plaintiff objected on the ground that the answer does not state facts sufficient to constitute a counterclaim, and the court sustained the objection and directed a verdict for the plaintiff, upon which a judgment was rendered, from which the defendant has appealed. The sole ground, as it appears, upon which the objection was sustained and the instruction given is that the answer is an attempt to contradict or vary the terms of a written contract by oral testimony. Manifestly it attempts to do no such thing, but does attempt to show that the writing does not express the entire agreement of the parties, nor purport so to do. If it does so purport, it is doubtless as conclusive in that respect as it is with regard to any other matter con-

cerning which it speaks; but if it does not so purport, then the question whether it does contain the entire agreement, and, if not, what are the omitted terms of the contract, are questions of fact to be determined in like manner as any other fact that is or might be put in issue by the pleadings.

The memorandum is in the form of a letter written by the plaintiff to the defendant and signed by both parties in duplicate. It begins by acknowledging the receipt of an order from the defendant for a number of the machines, and continues: "We also have advice from Mr. Graham (an agent of the plaintiff) of his verbal arrangement with you for the sale of our baby machines in that section, and are informed by him of your intention to devote every reasonable effort to the business. This being understood, we take pleasure in confirming Mr. Graham's arrangement, outlining below the discounts, terms and conditions which will govern until further notice, such being applicable to baby separators only and in no sense to power or factory sizes or Alpha machines." Then follows a schedule of terms and discounts, and of the times and manner of making orders and settlements and payments, and a description of the territory in which, and the prices at which, sales were to be made, and a direction to the defendant to sign an inclosed duplicate of the letter and return it to the plaintiff. The letter does not say that it expresses all the terms of the "verbal arrangement" between Graham and the defendant, which it "confirms" without limitation, and whether it does so must be ascertained by inference or by evidence *aliunde*. It appears to us that no certain inference as to the duration of the "arrangement" can be drawn from the language of the document itself. There are at least three possible suppositions: First, it may have been intended to continue until some definite and specified time; second, it may have been intended to be terminable arbitrarily at any time by one or either party as the plaintiff insists; or, third, it may have been intended to continue indefinitely so long as it should be reasonably satisfactory to both parties, as the defendant contends.

And, again, upon which of these intents the minds of the parties met, may have been left to be gathered by inference from the language of the memorandum, or may have been expressed in the "verbal arrangement," which the writing confirms, but which in its entirety it does not express or by necessary implication purport to give. Which of these conjectures is true can only be ascertained, if at all, from a knowledge of what was said and done at the time the arrangement was agreed upon. The memorandum is in terms a confirmation of a previous oral agreement, and of itself naturally, if not necessarily, raises the inquiry, what was that agreement?

We are of opinion, therefore, that the court erred in excluding the offered evidence from the jury and in directing a verdict for the plaintiff, and recommend that the judgment be reversed and a new trial granted.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED.

FRANK ANDERSON, APPELLEE, V. UNION STOCK YARDS COMPANY, APPELLANT.

FILED OCTOBER 4, 1906. No. 14,404.

1. **Master and Servant: ASSUMPTION OF RISKS.** A servant engaged in a hazardous occupation assumes the risk of injury to himself from all its obvious dangers.
2. **Evidence examined, and held to be insufficient to support the verdict.**

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Reversed.*

Grecne, Breckenridge & Kinsler, for appellant.

Weaver & Giller, contra.

AMES, C.

There is but one question in this case. The facts relative to it are not in dispute, and briefly but comprehensively stated are that the plaintiff was a middle-aged man of ordinary mental and physical endowments and of many years' experience as a railway switchman, in which capacity he had been for several months in the service of the defendant company and engaged in switching, coupling and uncoupling of cars at a point where the accident about to be mentioned happened. The tracks and roadbed of defendant company at that place were, and had been during all the time of the plaintiff's service, illy constructed, badly out of repair and obviously hazardous to the company's employees. The roadbed was winding and uneven, was continuously overflowed or partly submerged by water from a nearby sewer, and there were holes in and irregularities of the surface, more or less filled with mud, and caused, some of them, by the protrusion of the cross ties or the ends of them above the surface at some places and by corresponding depressions at others. So many and great were these defects that the cars, when moved over the tracks, swayed and rocked from side to side to a degree rendering it dangerous for the plaintiff to walk along the tops of them as he was frequently obliged to do in the discharge of his duties. It is the settled and undisputed law of this state that of injuries arising from any of these known and obvious defects the plaintiff, by continuing in his employment with knowledge of them, assumes the risk. *Norfolk Beet-Sugar Co. v. Hight*, 56 Neb. 162; s. c. 59 Neb. 100.

Plaintiff on a certain day stepped in between two cars, one of which was moving, for the purpose of making a coupling of them, and, in attempting to retreat from that position, lost his balance so as to be unable to mount the approaching car, as he had intended doing, and was swayed around and caught between its side and a platform of a nearby building, receiving injuries for which he re-

covered a verdict in this action. He testifies that from his sensations at the time of the accident he is satisfied that the loss of his equilibrium was due to his stepping into a hole in the roadbed just outside the railway rail and some six or eight inches deep. But he did not see such a hole either at that time, or before or after the event. But he says that he knew, and had previously known, that in that immediate locality the dirt was in places washed away so as generally to leave spaces between the ends of the ties, some of which were rotten and sticking up, and that the track there was generally out of repair and in bad condition. This is the substance of the whole of the evidence on behalf of the plaintiff with respect to the cause and the manner of the happening of the accident.

Now, accepting the doctrine of the above cited case as a major premise, the plaintiff cannot recover unless either one or the other of two inferences can reasonably be drawn from the foregoing evidence, that is to say: either that a hole such as he supposes, but of such a character as not to be obvious to him, had existed there for such a length of time, and so obviously to the defendant and its servants that they were guilty of negligence in allowing its continuance, or else that such a hole had been negligently made by the defendant or its servants without the knowledge of the plaintiff and so recently as to escape his notice. The latter of these suppositions there is no pretense of evidence to support, and the former of them is manifestly absurd. There is a third possible supposition, but it is involved in the former of those just mentioned and is disposed of with it. It may be assumed that such a hole as is suggested existed without the actual knowledge of either the plaintiff or his employer, but was the natural and probable result of the conditions of the locality with which he was familiar. In that case, danger of its production and of injury from it were risks which he assumed from the nature of his employment. In addition to the foregoing, a witness for the defense testified, with-

out contradiction, that he examined the place immediately after the accident and that there was no hole there. Presumably what the plaintiff mistook for a hole was a space between two protruding ends of cross-ties.

We are therefore of opinion that the evidence is insufficient to uphold the verdict, and recommend that the judgment be reversed and a new trial granted.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED.

LORENZO L. HILE, APPELLANT, v. M. N. TROUPE, COUNTY TREASURER, ET AL., APPELLEES.

FILED OCTOBER 4, 1906. No. 14,525.

1. **School Lands: REDEMPTION.** A lessee of school lands or his assignee under a lease executed pursuant to the act of February 24, 1883 (laws 1883, ch. 74), who is delinquent of payments reserved in the instrument, is entitled to redeem from a forfeiture incurred by such delinquency at any time before such lands shall be actually resold or released.
2. —: **LEASE, RECORDING ASSIGNMENT OF.** An assignment of a lease of school lands that was executed prior to the passage of the act of March 5, 1885 (laws 1885, ch. 85), is not affected by the provisions of that act requiring such assignments to be recorded in the office of the commissioner of public lands and buildings.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Reversed.*

H. M. Sinclair, for appellant.

Norris Brown, Attorney General, and *William T. Thompson*, contra.

AMES, C.

In December, 1883, one Reed became a lessee of a certain tract of school land of this state pursuant to a statute then in force, and his lease became by purchase and mesne assignment the property of the plaintiff herein in November, 1889. At that time no default of the covenants of the contract had been committed by the assignors of the plaintiff, and he at once entered into, and has since continued in, possession of the lands and has made lasting and valuable improvements thereon, claiming a right thereto as owner of the interest created by the lease and as assignee of the instrument. Continuously, also, from that time until the year 1904, he paid the annual instalments of rent reserved by the lease, which sums were received and accounted for, without objection, by the proper official authorities, as belonging to the public educational funds of the state. The plaintiff became delinquent of an instalment of rent stipulated by the contract to be paid for the year 1904, and thereupon the lands were, by authority of the board of educational lands and funds, advertised for sale or lease, pursuant to the statute, as having been forfeited. Notice of a declaration of such forfeiture by the board having been served upon the plaintiff, he at once, and before the time specified in the advertisement for offering the lands, tendered to the treasurer of the county in which the lands lie the full amount of all delinquencies, interest, penalties and costs that had accrued under the lease, as a redemption from such forfeiture. But the treasurer, acting under the advice and instruction of the state board, refused the tender and declined to accept the money offered, for the sole expressed reason that the time for such redemption had expired. The board thereupon proceeded to offer said lands at public auction, and pursuant to that procedure executed a lease of them to one Max Schlund, who by virtue of his lease claims a right to the possession of them and of the improvements situated thereon. This is an action upon a

petition setting forth the foregoing facts, and against the state board, the county treasurer and the lessee, Schlund, to obtain a judicial decree for redemption. A general demurrer to the petition was sustained, and the suit dismissed. The plaintiff appeals.

The statute in force at the time the lease in suit was executed enacted a procedure for the declaration of forfeitures in cases of delinquencies in payments of rents, but with the following proviso: "Provided, the owner of any contract of sale or lease so forfeited may redeem the same by paying all delinquencies and costs *at any time before such land is again sold or leased.*" Laws 1883, ch. 74, sec. 20. This proviso remained in force until 1903, when it was amended by substituting for the portion thereof printed in italics the words "at any time before such land is advertised to be leased at public auction" (laws 1903, ch. 100, sec. 17), and the statute as theretofore existing was then repealed. But the matter with which the legislature was dealing was not the exercise of governmental functions merely, but one having reference to the rights and obligations of the state as a party to certain contracts, and it is a well-settled principle that a state is as powerless, under the operation of section 10, article I of the constitution of the United States, to impair by law its own contractual obligations as it is to affect in like manner the contracts of natural persons. *Davis v. Gray*, 83 U. S. 203; *Hall v. Wisconsin*, 103 U. S. 5; *People v. Stephens*, 71 N. Y. 527. And it is a principle much older than the constitution of the United States "that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement." *Von Hoffman v. City of Quincy*, 71 U. S. 535, 550. This language is authoritative and binding, not only upon this court, but upon every branch and functionary of the state government. And it

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is said by the same high authority: "Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, * * * impairs its obligations." *Green v. Biddle*, 8 Wheat. (U. S.), *1, *84. It is clear therefore that the right of redemption created by the above quoted proviso in the statute in force when the lease in suit was made became incorporated with and a part of that instrument. The proviso had nothing to do, as the attorney general contends that it did, with mere procedure or with the remedy by which the state was and is entitled to declare and enforce a forfeiture and a resale or release of the land; but it is entirely distinct therefrom and expressly designed to preserve to the lessee the valuable right to atone for his delinquencies and to redeem his land from forfeiture at any time during the pendency of such proceedings and before their termination by an actual resale or release. That such a right is a contractual one, which is valuable and vested and protected by the above mentioned constitutional guaranty, the authorities leave us no room to doubt. *Bronson v. Kinzie*, 1 How. (U. S.) *311; *Howard v. Bugbee*, 24 How. (U. S.) 461; *Cargill v. Power*, 1 Mich. 369; *Moody v. Hoskins*, 64 Miss. 468; *Dorrington v. Myers*, 11 Neb. 388; *Von Hoffman v. City of Quincy*, *supra*. The act of 1903 was therefore, in the respect mentioned, inoperative upon the lease in question.

The statute enacted in 1883, and in force at the time the lease in suit was executed, contained no regulation with reference to the record of assignments of such instruments, nor requirement that they should contain any stipulation or recital relative to that subject, but in 1885 the legislature passed a new and comprehensive act "to provide for the registry, sale, leasing and general management of all lands and funds set apart for educational purposes, and for the investment of funds arising from the sale of such lands" (laws 1885, ch. 85), and to repeal an

act having a similar title passed in 1883, the latter being the statute first above mentioned. The new act provided a considerable amplification of the procedure established by that which it superseded, and contained several restrictions and regulations not found in the latter, and required, among other things, that leases issued pursuant to it should contain a stipulation or recital that "no assignment of such lease contract shall be valid unless the same be entered of record in the office of the commissioner of public lands and buildings." Laws 1885, ch. 85, sec. 14. But the act contained no general provision relative to the record of assignments of leases not containing such stipulation or recital, nor any, except that already quoted, with respect to those containing it, so that the requirement did not by its terms apply to the record of assignments of any leases, except such as should be thereafter executed pursuant to its authority. If the legislature intended that the regulation with respect to the record of assignment should have prospective operation only, and should be applicable solely to leases thereafter to be executed and containing the required recital, it could have chosen no more apt language for the expression of that purpose. It cannot be supposed to have been intended to have unrestricted retroactive operation, because the legislature was incompetent to invalidate previously executed assignments of then existing leases, and no practical object would have been accomplished by requiring such a record by persons holding or obtaining leases through mesne assignments, because a record of the immediate assignment, without a record of those intermediate, would not have disclosed a chain of title or have furnished the state board or the public with any useful information. The plaintiff's title was acquired through two mesne assignments, both of which were executed before the passage of the act of 1885, and to neither of which can that act, by any possible construction, be said to have been applicable, and we think that it had no application to the immediate assignment to the plaintiff.

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This conclusion relieves us from a necessity, which might otherwise have been imposed upon us, of deciding the questions of estoppel which were much discussed in the briefs and arguments of counsel on both sides. We may say in passing, however, that we much doubt that equity would permit a forfeiture for failure to record an assignment after there had been 13 years' occupancy under it in good faith, accompanied by the payment of that many years' rent charges, and the erecting of lasting and valuable improvements. It may be observed in this connection that it is not the lease that the statute avoids for failure to record an assignment, but merely the unrecorded assignment, and we doubt if the court would permit an extension of a forfeiture to the lease itself, or make a failure to record in a case like this, in which the assignee was known to be actually in possession and had made payment of instalments of rent which the state had accepted without objection, a cause for disturbing the plaintiff, except at the instance of some person having a better right. It is a matter of indifference to the state who has the bare legal title to the leasehold, or who furnishes the redemption money, so long as the latter is not a mere volunteer having no interest, which the plaintiff certainly is not. But, for reasons already stated, we do not find it necessary to express an opinion upon these questions, and therefore refrain from so doing. We are satisfied that upon the facts alleged in the petition and admitted by the demurrers the plaintiff is entitled to the relief prayed in his petition, and recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

EPPELSON, C., concurs.

OLDHAM, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district

court be reversed and the cause remanded for further proceedings.

REVERSED.

GEORGE E. NORWOOD V. BANK OF COMMERCE OF LINCOLN,
NEBRASKA.

FILED OCTOBER 4, 1906. No. 14,351.

1. **Note: BONA FIDE PURCHASER.** To defeat a recovery on a promissory note in the hands of an indorsee, who takes it before maturity for a valuable consideration, in the ordinary course of business, without notice, it is not sufficient to show that it was taken under circumstances which might excite suspicion in the mind of a prudent man, but it must be shown that the indorsee took the paper under circumstances showing bad faith or want of honesty on his part. *Dobbins v. Oberman*, 17 Neb. 163, followed and approved.
2. **Evidence examined, and held** not sufficient to show bad faith or want of honesty in the purchase of the note in controversy.

ERROR to the district court for Nuckolls county: **LESLIE G. HURD, JUDGE.** *Affirmed.*

Cole & Brown, for plaintiff in error.

S. L. Geisthardt and W. F. Buck, contra.

CLDHAM, C.

This action was begun in the district court for Nuckolls county, Nebraska, to recover the amount alleged to be due upon a certain promissory note, executed by the defendant and payable to the Leader Fence Machine Manufacturing Company, and alleged to have been indorsed for a valuable consideration to the plaintiff before maturity. Defendant, for answer to plaintiff's petition, admitted the execution of the note, and denied that the note was purchased for value, and without notice, by the

plaintiff before its maturity. The answer further alleged, in substance, that the note was given without consideration; that defendant was induced to sign the note by the representations of the agent of the fence company that the note would not be negotiated, and that it would be simply held as security for such machines as defendant would sell for the company for a period of six months; that it was agreed at the time of the execution of the note that defendant was to act as the agent of the fence company and sell its machines in a certain portion of Nuckolls county; that the machine company agreed to furnish machines to the defendant for sale at the price of \$6 apiece, with the freight prepaid, and to send a man to aid the defendant in the sale of the machines; and that the machines were represented to be first class in every particular, and that they would build and construct in an easy and practical manner any sort of a wire fence, and that they would sell readily, and that the company would furnish wire to him for building fences at two and one-half cents a pound; that defendant relied on all these representations when he signed the note, and that all such representations were false; that it was further represented that, if defendant did not sell any machines within six months, the company would return his note and take back the machines delivered to his order. It was further alleged that defendant had offered to return all machines and all property delivered to him by the company and had kept his tender good. There is no allegation in the answer that the maker of the note and the indorser thereof were solvent and known to be solvent at the time of the purchase of the note. Plaintiff filed a reply in the nature of a general denial of the new matter set up in the answer, and alleging the purchase in good faith, without notice in the ordinary course of business. On issues thus joined there was a trial to the court and jury, and at the close of the testimony the court directed a verdict for the plaintiff, and entered judgment on the verdict. To reverse this judgment defendant brings error to this court.

At the trial of the cause plaintiff assumed the burden

of proving the *bona fides* of the purchase of the note before maturity, and for this purpose offered in evidence the deposition of Morris Weil, president of the plaintiff bank, whose testimony on the material issues is as follows: "Q. I show you here a paper, identified by the reporter as Exhibit 1, purporting to be a promissory note for \$100 dated February 14, 1903, signed G. E. Norwood, and I ask you who is the holder and owner of this note? A. The Bank of Commerce. Q. Look at the indorsement there, the words 'Leader Fence Machine Mfg. Co., by J. M. Barber, Mgr.' I will ask you if you know whose signature that is? A. Yes. Mr. J. M. Barber. Q. Who is this J. M. Barber? A. He is the manager of the Leader Fence Machine Manufacturing Company. Q. When did the Bank of Commerce purchase that note? * * * With reference to the maturity, when was it, before or after? A. Long before. Q. What consideration, if any, did the Bank of Commerce give for it, cash or what? A. Cash. Q. In what way did the Bank of Commerce get it with reference to its being in the regular course of business? A. Mr. Barber presented this note with others and we purchased them of him in the regular course of business. Q. What knowledge or notice, if any, did you or the bank have of any defense of any kind to the payment of this note? A. None whatever. Q. Did you know of any reason of any kind why the maker should not pay the note? If so, state. A. None whatever."

Cross-examination: "Q. Do you know where Mr. Barber came from when he came to sell this note? A. I do not. Q. Had you seen him before that? A. Yes, sir. Q. Where and when? A. In the bank, at a previous time. Q. Had he made some arrangement, or had some conversation with you relative to the purchase of certain notes that he might obtain? A. No, sir. Q. Did you have any intimation of any kind that he would bring certain notes to you to purchase? A. No, sir. Q. What was the nature of his conversation with regard to this paper? A. He presented us a bunch of paper, and asked us on what basis we would

purchase them. We figured on them, and purchased them. Q. Did he tell you, or make you acquainted with the nature of his business at these times? A. Yes, sir. Q. What business did he say he was engaged in? A. Manufacturing machines for making wire fence. Q. Did you know anything of this company at the time that he came there? A. Yes, sir. Q. Did you inquire into the nature and character of the company? A. Yes, sir. Q. And you knew that he was the manager? A. Yes, sir. Q. Did you buy the note from him before you found out the financial responsibility of the maker? A. Yes, sir. Q. How much did you pay for the note? A. It was bought together with others. Q. What others? A. There were five different sets of notes presented at that time for discount. Q. How much did you say you paid for the note? A. It was bought with others and not bought separate. Q. Have you any idea how much you paid for this note? A. For the aggregate? Q. Yes. A. I have. Q. How much did the notes aggregate that you purchased at that time? A. I believe \$1,900. Q. That was the face of the notes? A. Yes, sir. Q. What did you pay for them? A. \$900. Q. How did you pay it? A. In cash. Q. Do you know anything about this man Barber's financial standing? A. Yes, sir. Q. What do you know about him? A. His record is good. Q. When you answer that, do you mean with reference to the company that he acted as manager for, or his own responsibility? A. The company and his own responsibility. Q. Both together? A. Yes, sir. Q. Did you ascertain that fact before you purchased the notes? A. Yes, sir. Q. I believe you answered that you did not make any inquiry about the maker of this note? A. Not before purchasing. Q. Did you, of any of those notes that you purchased? A. No, sir. Q. Did you know anything about their character or standing financially? A. Only the affidavits that were attached to those notes. You might not call it an affidavit, but a memorandum obtained from one of the officers, if I am not mistaken, that the makers of these notes had property in their own names, and were responsible

people." This was all the testimony offered on the *bona fides* of the transfer of the note, which was negotiable in form.

Defendant then took the stand on his own behalf and testified that the note was given to a Mr. Fiefield, who was an agent of the Leader Fence Machine Manufacturing Company, and offered to prove by himself and others that Fiefield, representing the fence machine company, made the representations alleged in the answer to procure defendant's signature to the note; and that the machines, for which the note was given, were an entire failure and did not build fences as represented, were not practical in any way, and were absolutely worthless; and also that the machines were to be sent to Nelson, freight prepaid, which was not done; and that as soon as defendant had discovered the fraud and misrepresentations he offered to return the machines and supplies that he had received from the company. This offer of proof was denied by the court, and, no other testimony being offered, the court directed a verdict for the plaintiff for the amount of the note and interest. In the case of *Violet v. Rose*, 39 Neb. 660, after a careful and painstaking review of the former decisions of this court, the rule was established that, where fraud is alleged in the inception of the note, the burden is on the plaintiff to prove the *bona fides* of the transfer; but, where a want of consideration is relied upon, the burden is on the defendant to show the *mala fides* of the transfer. It is also determined in this case that the order of proof, where failure of consideration is pleaded against an indorsee, rests in the sound discretion of the trial court, that is, that the court may permit testimony tending to show a failure of consideration before evidence tending to impeach the good faith of the indorsement has been offered. Now in the case at bar plaintiff on his own volition introduced evidence, already set out in this opinion, tending to show the good faith of the purchase of the note in suit, and the only evidence offered by defendant touching on this question was such as was elicited from plaintiff's pres-

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ident on his cross-examination. This testimony was that the president of the bank had purchased this note with others aggregating \$1,900, for the sum of \$900; that he knew that the party offering the notes was the general manager of the payee of the note, and that the payee was engaged in the manufacture of fence machines; and that both the general agent and the payee were reported to be solvent. Now, as before stated, there was no allegation in the answer that the maker of the note was solvent, or that the makers of any other of the bunch of notes purchased by plaintiff were solvent. The only thing touching on this question was the answer of plaintiff's witness that certain property statements were attached to the notes. Defendant offered no testimony directly tending to show that any of the makers of the notes purchased by the bank were in fact solvent and known to be so by the plaintiff at the time of the purchase. If all the evidence offered had been admitted, it would have constituted no defense against an indorsee under the law merchant. In *Dobbins v. Oberman*, 17 Neb. 163, it is said that, to defeat a recovery on a promissory note in the hands of an indorsee who takes it before maturity for a valuable consideration, "it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man. To have that effect it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part." This doctrine has been quoted with approval in *Rublee v. Davis*, 33 Neb. 779; *Martin v. Johnston*, 34 Neb. 797, and *First Nat. Bank v. Pennington*, 57 Neb. 404. The only evidence offered, which in any way tends to impeach the good faith of the purchase of the note in suit was the discount which the indorsee received on the whole bunch of notes purchased. These notes, presumably, were for small sums on different persons, residing at considerable distance from the place of business of the indorsee, so that the cost of collection might reasonably have been taken into consideration in estimating the discount on the paper. The note in suit bore no interest

by its terms, and there is no evidence that any of the others differed in this respect.

The question of the solvency of the makers was not placed in issue by the proof offered, so that the only question to determine is whether or not the discount for which the notes were purchased, standing alone, is sufficient to show bad faith in their purchase, while the purchase of negotiable paper on a known solvent maker for a sum materially less than the face of the paper is often referred to by judges and text-writers as a circumstance tending to show bad faith in its purchase; yet, unless the consideration is grossly inadequate, this circumstance alone is not sufficient to establish the *mala fides* of the transfer.

We are therefore of the opinion that the evidence offered was wholly insufficient to show either bad faith or want of consideration in the purchase of the note, and, consequently, it is immaterial whether the evidence offered by defendant tending to show a want of consideration as between the original parties to the note had been admitted or excluded, for in either event an instruction directing a verdict for the plaintiff should have been given. We therefore recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

AMERICAN BONDING COMPANY OF BALTIMORE, APPELLANT,
v. BELLE M. PULVER ET AL., APPELLEES.

FILED OCTOBER 4, 1906. No. 14,428.

1. **Depositions.** A deposition to be admitted in evidence must be reduced to writing by the officer taking the deposition, or by the witness giving the testimony, or by a disinterested person, in the presence of the officer.

2. ———: CERTIFICATE. A certificate to a deposition, which fails to show that the deposition was reduced to writing by the officer, or by the witness, or by a disinterested person, in the presence of the officer, and which further fails to show that the deposition was taken at the time and place named in the notice, is fatally defective.

APPEAL from the district court for Kearney county:
ED L. ADAMS, JUDGE. *Affirmed.*

Hall & Stout and J. H. Robb, for appellant.

M. D. King and J. L. McPheely, contra.

OLDHAM, C.

This was a suit in the nature of a creditor's bill seeking to set aside the conveyances of a tract of land in Kearney county, Nebraska, from defendant Belle M. Pulver to Christ Doyle, and from Ruth A. Doyle, the widow and devisee of Christ Doyle, to James E. Pulver, the husband of Belle M. Pulver. The petition alleged that these transfers were made without consideration and for the purpose of hindering and delaying the plaintiff, who was a judgment creditor of Belle M Pulver. The answer was in the nature of a general denial. There was a trial of the issues to the court, and at the close of the testimony plaintiff's bill was dismissed. To reverse this judgment of the district court plaintiff has appealed to this court.

An alleged error of the district court in suppressing the deposition of William M. Reinhardt, which was relied upon by the plaintiff to establish its claim as a purchaser and assignee of the judgment against Belle M. Pulver and others, is the only assignment relied upon for a reversal of the judgment. It is conceded that without the evidence contained in this deposition plaintiff's testimony was insufficient to sustain a judgment in its favor, so that the only question to be determined is whether or not the district court erred in suppressing this deposition. The notice to take the deposition was of a statutory form, and was to

the effect that on Monday, the 1st day of May, 1905, the plaintiff would take the depositions of William M. Reinhardt and other witnesses therein named before competent authority at the office of the American Bonding Company in the city of Baltimore, state of Maryland, at the hour of 10 o'clock A. M., with authority to adjourn from day to day until all such depositions shall have been taken. A copy of this notice was duly served upon the attorneys of the defendants. The certificate to the deposition of William M. Reinhardt, taken under this notice, was as follows: "State of Maryland, City of Baltimore, Sect.: I, Millard Leonard, a duly qualified notary public of the state of Maryland, in and for the city of Baltimore, do hereby certify that William M. Reinhardt was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth, and that the above deposition by him subscribed to, as above set forth, was reduced to writing by my official stenographer, J. C. Hayne, under my dictation and supervision, in my presence, and was subscribed to in my presence, and was taken in my office in Baltimore city, and that I am not counsel or attorney for either party. In testimony whereof, I hereunto subscribe my name and affix my notarial seal, this first day of May, A. D. 1905. (Seal) Millard Leonard, Notary Public." Section 385 of the code provides: "The officer taking the depositions shall annex thereto a certificate showing the following facts: First. That the witness was first sworn to testify the truth, the whole truth and nothing but the truth. Second. That the deposition was reduced to writing by some proper person (naming him). Third. That the deposition was written and subscribed in the presence of the officer certifying thereto. Fourth. That the deposition was taken at the time and place specified in the notice." A substantial compliance with these requirements of the statute is a necessary prerequisite to the admission of a deposition in evidence in the trial of a cause. An examination of the provisions of the section just quoted shows what are the essential requirements of a certificate to a

deposition. The certificate must show that the witness was sworn to testify to the truth, and "second, that the deposition was reduced to writing by some proper person." The provision requiring a proper person must be read in connection with section 380, which says: "The deposition shall be written in the presence of the officer taking the same, either by the officer, the witness, or some disinterested person." Here is a limitation on the authority to write the deposition, even in the presence of the officer, and this limitation is that either the officer must write it, or the witness must write it, or some disinterested person must write it, and then it must be subscribed by the witness. Now, the certificate in the case at bar shows that the deposition was reduced to writing by J. C. Hayne, the official stenographer of the notary, but it does not show that J. C. Hayne was a disinterested party. And, if he were not a disinterested party, he was not a proper person within the meaning of section 385 of the code, above quoted. The fourth provision of section 385, *supra*, is that the certificate shall show that the deposition was taken at the time and place specified in the notice. The notice, as before set out, provides that the deposition should be taken at the office of the American Bonding Company in the city of Baltimore, while the certificate shows that the deposition was taken "in my office in Baltimore city," meaning the office of Millard Leonard, notary public. It therefore appears that the certificate was irregular in not showing that the testimony was reduced to writing by a disinterested party, or a proper person, and also defective in not showing that it was taken at the time and place in the notice specified.

We are therefore of opinion that the trial judge was justified in suppressing the deposition, and we recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

Keith v. Bruder.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

J. H. KEITH, TRUSTEE, ET AL., APPELLEES, V. JOSEPH BRUDER
ET AL., APPELLANTS.

FILED OCTOBER 4, 1906. No. 14,430.

1. Judgment: REVIVOR. The successor of a deceased judgment creditor may, after the expiration of a year, revive an action by a bill or a supplemental petition.
2. Petition examined, and *held* sufficient to sustain the judgment.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Lewis C. Chapman, for appellants.

R. R. Dickson and *O. A. Williams*, *contra*.

OLDHAM, C.

This was an action instituted in the district court for Holt county, Nebraska, in the nature of a bill of revivor of a judgment entered in said court on the 30th day of November, 1891, for the foreclosure of a deed of trust executed and delivered to secure the payment of a promissory note therein described. It appears from the petition filed that all the parties in interest were duly served and in court at the time of the original decree of foreclosure; that thereafter an order of sale was duly issued upon the decree and the sale had, at which the beneficiary, the legal holder of the note, was the purchaser by his attorney; that thereafter the sale was confirmed and deed issued to the executors of the holder of the note, who had departed this life before the sale was had; that thereafter, it being made to appear to the court that the holder of the note, A.

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A. Low, who had been a resident of the city of Brooklyn, New York, had departed this life before the sale, the deed and order of confirmation of the sale were set aside, and the action was revived in the name of A. A. Low and Seth Low, the executors and administrators of the estate of the deceased. This order was entered on the 2d day of December, 1896, and a new order of sale was directed, but no sale was had under this order. On the contrary, the executors of the Low estate, under a provision of the will authorizing them to dispose of the personal and real property of the deceased, conveyed by deed the interest of the deceased in the lands in controversy to H. M. Henley, the plaintiff in interest in the present cause of action. Plaintiff filed this deed for record and thereafter, in January, 1903, instituted the present action by an original bill, in which he alleged the above stated facts and prayed the court that he be subrogated to the rights of the original judgment creditor; that the former void deeds be canceled, and that an alias order of sale be issued for the enforcement of the judgment. His prayer for relief was contested by defendants Bruder and wife, the owners of the equity of redemption in the lands, who filed a general demurrer to the petition. The demurrer was overruled, and a judgment was entered granting the relief prayed for in the plaintiff's petition. To reverse this judgment defendants have appealed to this court.

The sole question presented is as to the sufficiency of the petition to support the judgment. The contention seems to be that a judgment can only be revived on motion or on supplemental petition, but not by an original bill. The petition plainly on its face states a meritorious cause of action entitling plaintiff to equitable relief, unless he is foreclosed of such relief by the provisions of the code governing the revivor of actions. While the action was not brought within one year of the time the right accrued, as provided for in sections 456 to 470 of the code, yet the summary method pointed out in these sections of our statute have been held not to prescribe an exclusive method of

revivor. *Hayden v. Huff*, 62 Neb. 375, and cases there cited. On the contrary, it was held in the case just cited that an action for revivor after the expiration of one year might be maintained either by a supplemental petition or by an original bill, as was done in the case at bar.

We are therefore of opinion that plaintiffs' petition is sufficient to sustain the judgment, and we recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

LINCOLN TRACTION COMPANY V. WILLIAM H. BROOKOVER.*

FILED OCTOBER 4, 1906. No. 14,283.

1. Carriers: NEGLIGENCE: BURDEN OF PROOF. In an action for damages against a street railway company for a personal injury caused by the alleged negligent starting of one of its cars when the plaintiff, a passenger, was in the act of alighting, the defense being a general or special denial, the burden of proof never shifts, but remains with the plaintiff to prove that the injury was received substantially as alleged.
2. ———: ———: INSTRUCTION. When, in an action for damages for a personal injury inflicted while the plaintiff, a passenger, was in the act of alighting from a street railway car, the evidence is conflicting as to where the plaintiff alighted, an instruction that "plaintiff became a passenger of the company, and continued to be its passenger up to and including the act of alighting at his proper stopping place," is erroneous.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

Clark & Allen, for plaintiff in error.

Rose & Comstock, contra.

*Rehearing allowed. See opinion, p. 221, *post*.

EPPERSON, C.

This action was instituted by the defendant in error against the plaintiff in error in the district court for Lancaster county to recover damages for a personal injury caused by the alleged carelessness of the plaintiff in error. Plaintiff in the court below alleged that he was a passenger upon one of defendant's street cars west bound from Vine street in the city of Lincoln to the intersection of O and Sixteenth streets; that, while he was in the act of alighting at his place of destination, defendant's employees negligently, carelessly, and unlawfully, and without warning to plaintiff, and without stopping a sufficient length of time to permit the plaintiff to safely alight, started said car suddenly and with a jerk, the force of which unbalanced the plaintiff and threw him violently upon the pavement. For answer, the defendant alleged: First, a general denial; and second, admitted that the plaintiff was a passenger on defendant's car, and alleged "that, while the car was moving rapidly, and before it reached the crossing, the plaintiff left his seat in the car, walked to the platform, and negligently and carelessly stepped therefrom while the car was in motion as aforesaid, and fell upon the street, and whatever injuries the plaintiff received, if any, were caused by his negligence and carelessness in alighting from the car while it was in motion." The evidence was conflicting. The plaintiff testified that the injury was substantially as alleged in the petition. This was corroborated by other witnesses. Several witnesses for the defendant testified that it occurred as alleged in the second paragraph of the answer. The court gave instruction No. 10, in the first paragraph of which the jury were told that the burden of proof was on the plaintiff to establish the facts alleged in his petition and, in the second paragraph, that "the burden is upon the defendant to show that the plaintiff stepped from the car while in motion, and that the plaintiff was negligent in so doing, which negligence contributed proximately to his injury,

unless the plaintiff in making his own case has shown that said act in stepping from the moving car, if you find from the evidence that he did so step, was negligence which contributed to his injury as the proximate cause." That part of the instruction which relates to the burden being upon the defendant is alone objected to. In connection with this instruction, counsel for plaintiff places much stress upon the second paragraph of the answer, contending that it amounts to a plea of contributory negligence, and that under such a plea the instruction was proper. This also seems to have been the theory of the trial court. Contributory negligence is such an act or omission on the part of the plaintiff, amounting to a want of ordinary care, as, concurring or cooperating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of. To constitute contributory negligence there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury. The defense alleged in the second paragraph of the answer was not such a plea, but a special denial of the matters alleged in the petition. The answer was a very poor pleading, but as it was not assailed by motion we must consider it as it is, and not as it should have been. The plaintiff having alleged that his damages were sustained by the negligence of the defendant, the burden of proving it and of establishing such fact by a preponderance of the evidence rested upon him, and his duty in this respect was not lessened by the mere fact that the defendant had interposed a special denial. The burden of proof did not shift during the trial. It is true that the defendant introduced evidence to prove the fact alleged in his special denial, but such evidence would have been admissible under the general denial. The instruction was prejudicial. Under it the jury might reasonably say that, even though the evidence was evenly balanced as to the manner the accident occurred, yet the burden of proof, in view of the instruction, being upon the defendant, the defendant must fail, when, as a matter of law, had the evidence

appeared to the jury as evenly balanced, the verdict should have been for defendant. The instruction here complained of was similar to the instruction disapproved by this court in *Lincoln Traction Co. v. Webb*, 73 Neb. 136. In the opinion therein, delivered by BARNES, J., it is said: "The rule seems to be well settled that the burden of proof never shifts, but remains with the party holding the affirmative. When a party alleges the existence of a fact as the basis of a cause of action or defense, the burden is always upon him to establish it by proof." By the instruction in the case at bar the court virtually told the jury that the burden was upon the plaintiff to establish that he received the injury substantially as alleged in his petition, and that the burden was upon the defendant to prove that plaintiff was guilty of the negligence alleged in the special denial. Both could not be true. Evidence of the latter of equal weight with the evidence of the former should have defeated the plaintiff.

The court gave instruction No. 7, excepted to by the defendant. That part assigned as error reads as follows: "The plaintiff, on the evening when the accident in controversy happened, became a passenger of said company, and continued to be its passenger up to and including the act of alighting at his proper stopping place." Under the petition it will be observed that the plaintiff desired to alight at the junction of Sixteenth and O streets, and, according to his evidence, he did alight at that place. It was the defendant's theory, supported by evidence, that the plaintiff voluntarily jumped from the car before it reached that point and while the car was in motion. This instruction was prejudicial. The question as to where the plaintiff alighted was a material one in this case, and it was a question for the jury to determine. From the instruction the jury might reasonably infer that the trial court was of the opinion that the plaintiff did remain on the car until the junction was reached.

For the reasons above stated, we recommend that the

judgment of the district court be reversed and the cause remanded for a new trial.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons appearing in the foregoing opinion, the judgment is reversed and the cause is remanded to the district court for a new trial.

REVERSED.

The following opinion on rehearing was filed March 21, 1907. *Former judgment vacated and judgment of district court affirmed:*

1. **Trial: INSTRUCTIONS.** The court should instruct the jury upon all the issues presented in the pleadings and evidence.
2. **Pleading: CONTRIBUTORY NEGLIGENCE.** An answer in a personal injury case, which sets forth an act or omission of the plaintiff, characterizes it as negligent, and alleges that it caused or contributed to the injury complained of by the plaintiff's petition, is sufficient to tender the affirmative issue of contributory negligence.
3. **Instructions.** The true meaning of instructions is to be determined, not from a separate phrase or paragraph, but by considering all that is said on each subject or branch of the case.
4. ———. An instruction which, if standing alone, might be erroneous, may not be so when considered with other instructions upon the same subject given in connection therewith.

BARNES, J.

In the argument upon the motion for rehearing it was made manifest that the opinion, *ante*, p. 217, does not clearly set forth the points which it was intended to determine. The petition alleged that the plaintiff was a passenger upon one of the defendant's street cars going west upon O street from Vine street to the intersection of Sixteenth street; "that, while he was in the act of alighting at his place of destination, defendant's employees negligently, carelessly and unlawfully, and without warning to plaintiff, and without stopping a sufficient length of time to per-

mit plaintiff to safely alight, started said car suddenly and with a jerk, the force of which unbalanced the plaintiff and threw him violently upon the pavement." The contention of the defendant was that the evidence in his behalf upon the trial strongly tended to show that the plaintiff did not ride to the intersection of Sixteenth street, but, on the other hand, alighted from the car before reaching that place and while the car was in motion and not at a regular stopping place. The defendant further contended that the only issue of fact tried to the jury was whether the plaintiff's allegation that he rode to the proper stopping place, and the place of his destination, before attempting to alight was true, and insisted that upon that issue the burden of proof was upon the plaintiff; whereas the defendant contended the instruction given, which was quoted in the former opinion incorrectly placed the burden of proof upon the defendant, upon the issue actually tried. It was this reason that led the court to adopt the conclusion reached in the former opinion. We are satisfied upon further examination of the case that this was an error. There can, of course, be no doubt that the answer of the defendant was an ordinary plea of contributory negligence. It contains all of the elements of such a plea, and there can be no doubt that, if the sole issue tried was presented upon the affirmative allegations of the plaintiff's petition to the effect that the plaintiff rode to his destination to the intersection of Sixteenth street and there alighted from the car, the answer of the defendant might be treated as a general and specific denial of that issue, and upon that issue, of course, the burden of proof would be upon the plaintiff. We are satisfied, however, that, while the evidence introduced upon the trial was largely directed to the question whether or not the defendant continued upon the car until it stopped at the intersection of Sixteenth street, his final destination, still, as the issues in the case were presented and tried, the instruction given by the court upon the question of contributory negligence was justified by the general issues presented and was not erro-

neous. The defendant alleged that, "while the car was moving rapidly, and before it reached the crossing, the plaintiff left his seat in the car, walked to the platform, and negligently and carelessly stepped therefrom while the car was in motion as aforesaid, and fell upon the street, and whatever injuries the plaintiff received, if any, were caused by his negligence and carelessness in alighting from the car while it was in motion." This presented the issue of contributory negligence, and there was evidence in the record tending to support it. It was therefore proper for the court to instruct upon that issue, and as the instruction given by the court fairly presented that issue to the jury, it was properly given.

As another reason for reversing the judgment of the district court, it was held in the former opinion that the court erred in giving the seventh paragraph of his instructions, which reads as follows: "The defendant company is a common carrier of passengers, and as such is required to exercise the utmost skill, diligence and foresight consistent with the business in which it is engaged for the safety of its passengers, and becomes liable for the slightest negligence in that regard. The plaintiff, on the evening when the accident in controversy happened, became a passenger of said company, and continued to be its passenger up to and including the act of alighting at his proper stopping place." It is the last paragraph of the instruction that was disapproved, and such disapproval was based on the expression, "at his proper stopping place." It was said: "The question as to where the plaintiff alighted was a material one in this case, and it was a question for the jury to determine. From the instruction the jury might reasonably infer that the trial court was of the opinion that the plaintiff did remain on the car until the junction was reached." We have reexamined the record, and find that paragraph 8 of the instructions, immediately following the one complained of, correctly submits the disputed issue as to whether plaintiff stepped off the car while it was in motion, or attempted to alight

therefrom after it had stopped at the crossing. By the concluding part of the ninth paragraph of the instructions, the jury were also told to determine whether "the plaintiff stepped from a moving car." By the tenth instruction, defining the burden of proof, the jury were again told to determine whether the plaintiff stepped from the car while it was in motion. Again, this question was submitted to the jury by a special request for findings, which appears in the record as follows: "Did the car on which the plaintiff was a passenger come to a stop at the intersection of O and Sixteenth streets before the plaintiff alighted?" To this special interrogatory the jury answered, "Yes." The next special inquiry was: "Did the car start while he was in the act of alighting?" This was also answered, "Yes." It is a well-established rule that instructions must be construed together, and if, when taken as a whole, they correctly announce the rules applicable to the issues and the evidence they will be upheld, even though a single paragraph standing alone may be faulty. *Bartley v. State*, 53 Neb. 310; *Love v. Putnam*, 41 Neb. 86. The true meaning of instructions is to be determined, not by a separate phrase or paragraph, but by considering all that is said on each particular subject or branch of the case. The instruction in question was intended to serve the single purpose of defining the relationship of carrier and passenger. If the expression, "at his proper stopping place," had been left out of the instruction, it would have been absolutely correct. That it ought not to have been used there can be no doubt. But after examining the whole record, and construing the instructions together as a whole, we are of opinion that the jury could not have been, and were not, misled thereby.

For the foregoing reasons, our former judgment is vacated and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

HORACE BROCKWAY, APPELLEE, V. HENRY REYNOLDS ET AL.,
APPELLANTS.

FILED OCTOBER 4, 1906. No. 14,421.

1. **Justice of the Peace: APPEAL: PLEADING.** On appeal to the district court a defendant is not required to allege a counterclaim in the same language in which it was pleaded in the inferior court. It is sufficient if the identity of the counterclaim is preserved.
2. **Depository: ACTION: DEFENSES.** The depository of funds in escrow is entitled to prove any facts which would defeat the plaintiff's claim thereto.

APPEAL from the district court for Dawes county:
JAMES J. HARRINGTON, JUDGE. *Reversed.*

Albert W. Crites and Ernest M. Slattery, for appellants.

J. E. Porter and D. B. Jenckes, contra.

EPPERSON, C.

This action was instituted before a justice of the peace in Dawes county, and taken on appeal to the district court. The plaintiff alleged that he issued his check on the Commercial State Bank of Crawford in the sum of \$125, payable to the defendant, Pitman; that said check was deposited with the defendants, Reynolds and Slattery, with a written agreement providing that the check should be delivered to Pitman whenever he procured the transfer to the plaintiff of a certain mortgage deed and the notes secured thereby; that Pitman never secured the transfer of said mortgage and notes; that it was then beyond his power so to do; that Pitman indorsed the check in controversy, and that defendants negotiated the same without plaintiff's knowledge or consent, and that the amount thereof was paid from the plaintiff's funds. The defendant Pitman filed a counterclaim, in which he alleged that on or about the 7th day of January, 1901, the plaintiff agreed to pay him the sum of \$100 for his deed conveying

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to the plaintiff the legal title to the land described in the plaintiff's petition; that the deed and purchase price were deposited with defendants, Reynolds and Slattery, to become effective upon plaintiff's receiving the sheriff's deed to the same premises; that on or about the 25th day of March, 1901, the plaintiff, without the knowledge or consent of the defendant, Pitman, and for the purpose of cheating and defrauding the defendant out of the sum of \$100, represented to Reynolds and Slattery that he wanted to show the said deed to his attorneys for examination, and if they would let him take it for that purpose he would return it in a short time. Upon such representations the deed was delivered to plaintiff, who converted the same to his own use, and caused it to be recorded; that plaintiff forbade Reynolds and Slattery to pay the \$100 purchase price to Pitman. He prayed judgment against the plaintiff for \$100. The plaintiff filed a motion to strike the defendant's counterclaim from the files, for the reason that it set forth a separate and distinct contract not pleaded in the court below. This motion was allowed, and the counterclaim stricken. The counterclaim alleged in the inferior court omitted the reference to the obtaining of the sheriff's deed pleaded in the district court, and failed to allege when the delivery of the deed was to be made under the agreement. Otherwise, the counterclaim alleged in the district court was substantially as that in the justice's court.

It has been held by this court that a cause of action on appeal need not be alleged in the same language used in the inferior court, but if the identity of the cause of action is preserved the pleading is sufficient. *Citizens State Bank v. Pence*, 59 Neb. 579; *Levi v. Fred*, 38 Neb. 564. In the case at bar the counterclaim alleged was the fraudulent procuring of the deed by the plaintiff from the depository, for which the plaintiff had agreed to pay a fixed price. By the counterclaim alleged in each court the defendant, Pitman, sought to recover the amount. The court's order striking the counterclaim from the files was

wrong, and for this reason the judgment of the district court should be reversed as to the defendant, Pitman.

Defendants Reynolds and Slattery filed their separate answer, claiming \$25 for services rendered plaintiff, and alleging that the defendant, Pitman, demanded of them \$100 of the amount deposited, as the consideration for the deed delivered to plaintiff. After the court struck out the counterclaim of the defendant, Pitman, Reynolds asked leave to amend the prayer of their answer, by asking judgment against the plaintiff for the additional \$100 as a protection to them against the claim of Pitman. This the court refused.

There was evidence introduced to the effect that \$100 of the \$125 deposited was to be used to pay for Pitman's deed, the other \$25 to pay Pitman for his services in procuring an assignment of a mortgage on the same land; the whole amount to be delivered to Pitman, whenever he should procure the assignment of the mortgage to plaintiff. There was also evidence that, in the event that Pitman failed to procure the assignment of the mortgage, the check was to be returned to plaintiff, unless he should then elect to pay \$100 for the deed. There was evidence, also, showing that the plaintiff fraudulently obtained possession of the deed from Reynolds and Slattery. Whether such evidence might be overcome by plaintiff, we are unable to say, as he was not required to refute it. Consideration of the same was taken from the jury by the rulings of the trial court. It appears that the plaintiff has procured Pitman's deed to certain land. He agreed to pay for same, but has not done so, and, according to the judgment of the district court, will avoid paying for it, or will subject the defendants to further and unnecessary litigation. If the defendants' theory of the case is right, then \$100 of the amount deposited by the plaintiff with Reynolds and Slattery belongs to Pitman, and defendants should have a judgment against the plaintiff for a dismissal of his case, and for interest and costs. But the trial court refused defendants a hearing on their theory of

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the case, and gave judgment to the plaintiff for the amount sued for, less the amount due to Reynolds and Slattery for services performed. As the depositary of the funds in escrow, Reynolds and Slattery were bound to account to Pitman for his property deposited with them, and were entitled to prove any facts which would defeat the plaintiff's claim thereto, and show the title to the deposited funds in their codefendant. Evidence of Pitman's claim to the \$100 deposited should have been submitted to the jury.

We recommend that the judgment of the trial court be reversed for a new trial upon the pleadings, including the counterclaim stricken from the answer of the defendant, Pitman, upon his refileing the same.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons appearing in the above opinion, the judgment of the district court is reversed for a new trial upon the pleadings, including the counterclaim stricken from the answer of the defendant, Pitman.

REVERSED.

H. A. MERRILL, APPELLEE, V. LIZZIE A. CONROY ET AL.,
APPELLANTS.

FILED OCTOBER 4, 1906. No. 14,442.

Newspaper. The Omaha Daily Record is a "newspaper," within the meaning of section 497 of the code. *Hanscom v. Meyer*, 60 Neb. 68, and *Turney v. Blomstrom*, 62 Neb. 616, followed.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed*.

John T. Dillon, for appellants.

Wharton, Adams & Morgan, contra.

EPPERSON, C.

This is an appeal from a decree of confirmation entered in the district court for Douglas county. Appellants

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object to confirmation on the ground that The Omaha Daily Record, the paper in which the notice of sale was published, is not a "newspaper" within the meaning of section 497 of the code, and section 11420, Ann. St.

Our statutes nowhere define the word "newspaper." The paper in question has been regularly published in the city of Omaha for 20 years and in general circulation in Douglas county. Among its subscribers are bankers, real estate agents, rental agents, architects, bonding companies, public and private contractors, public service corporations, and attorneys. It contains a large and varied advertising list covering many lines of business, and publishes news concerning city ordinances, resolutions of the city council, building improvements, transfers of real and personal property, building permits, court proceedings, probate matters, public sales, together with brief items of local and foreign news of general interest, and miscellaneous items of interest to the general reading public on political, social, moral, religious and other subjects. The publication here involved is quite similar to those considered by this court in *Hanscom v. Meyer*, 60 Neb. 68, and *Turney v. Blomstrom*, 62 Neb. 616. - In our opinion the rule there announced requires the affirmance of this judgment. The Omaha Daily Record is a "newspaper" within the meaning of the law as construed by this court in the cases above cited. See also *Hall v. City of Milwaukee*, 115 Wis. 479, where authorities from other jurisdictions are reviewed.

We recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHARLES E. LEAR, APPELLEE, v. BROWN COUNTY, APPELLANT.

FILED OCTOBER 4, 1906. No. 14,713.

Judgment: PLEADING. The orders or judgments of a court of general jurisdiction may be pleaded in general terms without alleging jurisdictional facts.

APPEAL from the district court for Brown county:
JAMES J. HARRINGTON, JUDGE. *Affirmed.*

William M. Ely, for appellant.

M. F. Harrington, contra.

EPPERSON, C.

Appellee, Lear, an attorney at law, filed his claim against the county of Brown, and from a decision of the county board an appeal was taken to the district court, where he alleged in his petition, among other things, "that on the — day of —, 1903, one Fred M. Hans was indicted for the crime of murder in the district court for Brown county, Nebraska, and that thereafter this plaintiff was duly appointed by the district court for Brown county, Nebraska, to aid and assist the county attorney of said county in the trial, preparation and prosecution of the said Fred M. Hans upon said charge, and that he assisted in the prosecution of said cause and in a second trial of Fred M. Hans for murder in the year 1905; that, prior to filing said claim, the judges of said court before whom said cause was tried duly certified that said services were rendered by plaintiff, and such certificate was duly presented to the said county board with said claim." The county demurred to this petition, and upon the demurrer being overruled elected to stand thereon. Judgment was rendered for appellee, and the county appeals, assigning as error the overruling of the demurrer to the petition.

Section 9144, Ann. St., among other things, provides: "That the county attorney of any county may, under the direction of the district court, procure such assistance, in the trial of any person charged with the crime of felony, as he may deem necessary for the trial thereof, and such assistant or assistants shall be allowed such compensation as the county board shall determine for his services to be paid by order on the county treasurer." Appellant contends that the petition is insufficient because it does not contain an allegation that the assistance in the trial of a felony cause was procured by the county attorney. Under section 9144, *supra*, in order to charge the county with the compensation of an assistant for the county attorney in the trial of felony cases, the services must be procured by the county attorney under the direction of the district court, and the district judge must certify that such services were rendered. The petition fails to allege that the services of appellee were procured by the county attorney, but alleges its equivalent—that appellee assisted the county attorney after the appointment by the court. The appointment alleged in the petition is equivalent to the direction required by the statute. And as the district court is a court of general jurisdiction its orders and judgments may be pleaded in general terms and will be presumed to be regular. *Bennett v. Bennett*, 65 Neb. 432. The appointment by the court is but the legal effect or determination of the court's proceedings in the matter, and jurisdictional facts need not be pleaded.

We therefore recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CITIZENS INSURANCE COMPANY ET AL. V. MARTIN HERPOL-SHEIMER ET AL.**FILED OCTOBER 4, 1906. Nos. 14,347, 14,348, 14,349.**

1. **Trial: HARMLESS ERROR.** An attorney employed by the insured to make out proof of loss refused to surrender the policies of which he had possession, claiming a lien thereon for professional services. In a suit brought against the insurance companies, the attorney was made a party defendant, and filed an answer and cross-petition asking judgment against the plaintiffs for the amount due him for his services and that it be made a lien on any judgment which the plaintiff might obtain against the defendants. The defendants asked that the issues made by their answers and those made by the answer and cross-bill of the attorney be tried separately. This the court denied, and proceeded to take evidence on all the issues made by the several parties. *Held*, Not reversible error.
2. **Pleading: AMENDMENT.** At the conclusion of the evidence the defendants asked leave to file an amendment to their answers to conform to the proof before the court. The trial was to the court without a jury. The application to amend was taken under advisement by the court and thus held until the final determination of the case, when an order was entered allowing the amendment, but reciting that "it would be considered as denied by the plaintiffs." *Held*, That a motion for judgment on the pleadings in favor of the defendants was properly overruled, as the effect of the order allowing the amendment to be filed was to grant such leave only on condition that the statements in the amendment should be considered denied by the plaintiffs without any formal pleading to that effect being filed, and the defendants could not have any benefit from the amendment without recognizing the condition.
3. **Insurance: DEMAND: MERGER.** All verbal demands for an appraisal and for an examination of the insured under oath touching the cause and origin of the fire are merged in a subsequent written demand therefor.
4. **A written demand for the examination under oath of the insured, made jointly by three insurance companies, and which omits to name the time and place for such examination, or the person before whom it is to take place, is not a sufficient demand.**
5. **Trial: EVIDENCE: REVIEW.** In a case tried to the court, the presumption obtains that the court, in arriving at a decision, will

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consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was admitted.

6. **Insurable Interest.** A party to whom goods are consigned for sale on commission, and who is required to account to the owner for all goods received, has an insurable interest therein.
7. **False swearing in the proof of loss** cannot be predicated on a claim made for the retail price of the goods, and for freight, drayage, washing, setting up, etc., where such claim is made in good faith under the advice of an attorney regularly employed to advise and assist in making such proof.
8. **Findings: REVIEW.** The findings of a court in a case tried to the court without the intervention of a jury are entitled to the same weight as the verdict of a jury, and will not be set aside when there is evidence to support them.

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

Greene, Breckenridge & Kinsler and Hall, Woods & Pound, for plaintiffs in error.

Field, Ricketts & Ricketts, contra.

DUFFIE, C.

These actions are brought on policies of fire insurance issued by the several plaintiffs in error to the defendants in error on their stock of buggies, wagons, plows, harvesters, and all other merchandise usually kept in a business of this kind, like harness, binding twine, etc. The Herpolsheimers were insured in different companies for \$8,000, \$1,000 of which was in the Citizens Insurance Company, \$2,000 in the Phenix Insurance Company, and \$1,000 in the Reliance Insurance Company. The remainder of the \$8,000, aside from \$3,000, carried by the Citizens Insurance Company in a separate policy not involved in these actions, was carried in other companies. On the night of August 21, 1904, a fire occurred, whereby certain of the insured property was wholly destroyed and other parts thereof damaged. F. P. Olmstead, an attor-

ney at Hastings, was employed to advise and assist the Herpolsheimers in their preparation of proofs of loss and in attempting to adjust the same with the several companies. Afterwards other attorneys were employed, and Olmstead refused to surrender to the plaintiffs the policies which had been placed in his hands. When suit was brought on the policies involved in this action, Olmstead was made a party defendant in order, as stated by the defendants in error, that the policies might be available on the trial and the defendant companies discharged from further liability thereon. Olmstead filed an answer and cross-bill, setting up an attorney's lien on the policies for legal services performed, and asking that he might have judgment for the amount of his claim against the Herpolsheimers and that it be made a lien on any amount recovered by them. As his claim has been fully settled and disposed of it will not be further noticed, except so far as it is necessary to discuss the claim made by the plaintiffs in error that they were prejudiced by his claim being litigated in the same suit in which they were defending against a recovery on the policies by the Herpolsheimers. The case against the Citizens Insurance Company was tried to the court without a jury, and the other cases were submitted by stipulation on the same evidence, and the stipulation further provides that they are to be submitted to this court upon the same brief. The court found against the plaintiffs in error, and entered judgment for \$946.79 on each \$1000 of the amount of the insurance. The policies contain the following provision: "This entire policy shall be void * * * in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." At the conclusion of the evidence plaintiffs in error asked leave to amend their answers to conform to the proof. The amendment alleged false statements on the part of the defendants in error, in that their sworn proof of loss was false and fraudulent in many particulars specifically set out in

the amendments offered. These amendments were lodged with the clerk March 14, 1905, but the court held the same under advisement until the final decision of the cases on the merits on April 8, 1905. From the journal entry it appears that the court then made the following disposition of the application to amend the answers: "At the conclusion of the evidence the defendant company requested leave to file a supplemental answer charging the plaintiffs with false swearing in their proof of loss. Ruling at the time was reserved. The defendant company has placed in the hands of the clerk the proposed supplemental answer. Leave is now given the defendant company to file the same. It will be considered as denied by the plaintiff."

After the entry of judgment plaintiffs in error filed a motion for judgment on the pleadings, grounded upon the fact that defendants in error had filed no reply to the allegations of the amended or supplemental answers, and the first assignment of error argued in the brief is based upon the refusal of the court to sustain said motion, and to enter judgment in favor of the plaintiffs in error. It is urged that under our practice all material allegations of an answer not denied by the reply stand admitted; and it was held in *Grant v. Bartholomew*, 57 Neb. 673, that, "though the evidence disproves the material allegations of new matter in the answer, such evidence will be disregarded, unless such new matter is denied by a reply." That a material allegation in the petition not denied by the answer, or in the answer not controverted by the reply, stands admitted, is the rule of our code which the plaintiffs in error insist shall be applied in these cases. To this contention we cannot agree. Aside from the fact that leave to file this amendment was not given until the entry of final judgment in the case, when the defendants in error had no opportunity to file a reply, is the provision of section 144 of the code, providing for amendments, which directs the court to allow them on such terms as shall be just. When leave was asked to file the

amendments in question, the court took the matter under advisement and did not pass upon the question until it had finally disposed of the case. It then allowed the amendment to be filed upon condition that the allegations therein contained should be considered denied. If the plaintiffs in error wish to avail themselves of any benefit from their amendments they must accept the conditions imposed by the court in allowing the same. It is not unreasonable to attach to the filing of an amended pleading, under the facts above set out, a condition that the allegations contained in the amendment shall be considered denied without the filing of any formal pleadings by the opposite party controverting its allegations. Any other course would have worked a grave injustice to the defendants in error, who were not present and had no opportunity to reply.

When the case was called for trial, the plaintiffs in error requested that the issues made between the Herpolsheimers and the companies, and the issues raised by the pleadings filed by Olmstead, be separately tried. This was refused by the court, and such refusal is assigned as error. It is insisted, and there is some force in the suggestion, that Olmstead and the Herpolsheimers tried the case on inconsistent and conflicting theories, and that plaintiffs in error had to meet each of those theories and were placed at a disadvantage in consequence thereof. We cannot avoid the suspicion, after reading Olmstead's pleadings in the case, that plaintiffs in error were quite contented that Olmstead should remain a party to the suit and establish, if he could, the allegations of his cross-bill. That his presence in the action was more embarrassing to the defendants in error than to the companies is quite apparent from an inspection of the record; but in any event Olmstead had no claim against the companies, and the most he could do was to establish the amount due him for legal services from the Herpolsheimers, and have this claim made a lien upon any judgment that might be entered against the companies in their favor. That it was

reversible error to join the trial of these two claims is not apparent.

Assignments 3, 5 and 6 each relate to alleged errors in the introduction of testimony. As the case was tried to the court without the intervention of a jury, the admission of incompetent or irrelevant evidence is not reversible error. In *Willard v. Foster*, 24 Neb. 205, it is said: "In causes thus tried, it has been often held by this, as well as other courts, that error for the admission of improper evidence would not lie. The court must necessarily have an opportunity to examine each article of evidence offered, even for the purpose of rejecting it; and so the duty of acting and deciding the cause, upon the legal and relevant evidence selected from the mass that may have been introduced, may be as well discharged by the court upon the final consideration of the cause, as to pause in the course of the trial, to pass upon the admissibility of the several matters offered in evidence." This has been the uniform rule of this court, as evidenced by numerous cases since the decision in *Willard v. Foster*, *supra*.

The fourth assignment relates to the finding of the district court that the Herpolsheimers had an insurable interest in what is known as the "Acme harvester repairs." The evidence is sufficient to establish the findings of the court that the Acme harvester repairs were received by the Herpolsheimers under a contract by which they were authorized to sell the same and give title thereto; that they were to receive as their compensation the amount of the sale, less a fixed price for the goods, and they were liable to account for the stipulated price if the goods were not accounted for. This, no doubt, under the authorities, gave the Herpolsheimers an insurable interest in the goods. In *German Ins. Co. v. Hyman*, 34 Neb. 704, it was held that "an interest, to be insurable, does not depend necessarily upon the ownership of the property. It may be a special or limited interest disconnected from any title, lien, or possession. If the holder of an interest in property will suffer loss by its destruction he may indem-

nify himself therefrom by a contract of insurance. If, by the loss, the holder of the interest is deprived of the possession, enjoyment, or profit of the property, or a security or lien resting thereon, or other certain benefits growing out of or depending upon it, he has an insurable interest." The fact that the contract between the Acme company and the Herpolsheimers required them to insure the property in the name of the Acme company is a matter solely between these parties, in which the insurance companies are not interested.

The seventh assignment relates to alleged errors of the court on its finding of damages to the binding twine, the value thereof and the admission of testimony in relation thereto. None of the twine was burned. The damage thereto was by water. A portion of the twine, perhaps one-half of it, was taken out of the burned building, put upon a wagon, and removed to what is known in Hastings as the "Minneapolis Thresher Building." One or more witnesses testified that this portion of the twine had not been damaged by water. Other witnesses controverted this, and said that all the twine had been watersoaked. Several witnesses testified that they had had experience with binding twine, and that after being wet it had no commercial value. It further appears that the Herpolsheimers proffered this twine to the companies at the cost price, or that the twine be placed in the hands of any dealer the companies might select, to be sold by him to the best possible advantage, and the difference between what it brought and its value before the fire determine the damages. If the twine was not damaged, or not damaged to the extent claimed by the plaintiffs, this proposition was entirely fair, and practically gave the insurance companies the privilege of ascertaining the damage by their own agent.

Relating to false statements in the proof of loss, which is assignment No. 8, the alleged false swearing is based upon the fact that in the proof of loss many of the items constituting it were placed at a sum in advance of the fac-

tory cost, and that the proofs made claim for the loss of the Acme harvester repairs, in which, it is claimed, the defendants had no insurable interest. It is shown by the evidence that Mr. Olmstead, the attorney engaged by the Herpolsheimers to prepare the proofs of loss, advised them that they were entitled to the retail price of the goods, and for freight, drayage, washing, setting up, etc. The Herpolsheimers acted upon this advice and, nothing appearing to show their lack of good faith in so doing, they cannot be charged with wilful false swearing. That they had an insurable interest in the Acme repairs we have already determined.

The ninth assignment relates to finding No. 6 by the district court, which is in the following words: "That plaintiffs did not, nor either of them, refuse to submit to examination under oath by any person named by the defendant company, and to subscribe the same." September 14, 1904, M. M. Hamlin, an adjuster representing the several companies, made a written request upon the plaintiffs in error for an appraisal of the loss, and this written request also demanded a sworn examination of the Herpolsheimers in the following language: "We further demand that you submit to a sworn examination under oath regarding the cause or origin of said fire, and such other facts and information as may be necessary for the above companies to form an intelligent opinion of same." Hamlin claims to have made a verbal demand upon both the Herpolsheimers and their attorney, Olmstead, for an examination at his hotel in Hastings, and during his stay there, and he testified that Olmstead refused to allow his clients to be examined under oath. Olmstead testified that he met Hamlin on several occasions, "and that, whenever he suggested or demanded that the plaintiffs in the case should be examined under oath by the insurance company, I made him the tender that they would appear anywhere and at any time, and answer any questions that they would put to us, in the city of Hastings." It further appears from the testimony of Hamlin that, when talking

with Olmstead about the appointment of appraisers and the demand for a sworn examination of the Herpolshelmers, Olmstead told him to put his demand in writing, and that thereupon he prepared the paper containing the demand for a sworn examination and served the same upon the Herpolshelmers and their attorney. This written demand must be regarded as merging all former verbal requests and as the final demand made upon the defendants in error for a sworn examination. That it was not sufficient is abundantly shown by the authorities.

In *Aetna Ins. Co. v. Simmons*, 49 Neb. 811, it is said: "But if the clause in the policy under consideration be one with which the insured must comply in order to recover, then it was incumbent upon the insurance company to fix a time and a place and to name some person authorized by law to administer oaths before whom the examination of the insured should be had. The insurance company did none of these things. Doubtless the time fixed for the examination must have been within a reasonable date after the company received notice of the fire. Doubtless the place of the examination would have been at a reasonably convenient place in the county where the assured resided. It remains to be said of the question under consideration that a fair construction of the clause of the policy is that the insured shall submit to examination under oath at such reasonable place as may be designated by the company or its representative. We reach the conclusion that the insurance company, by failing to demand this examination within a reasonable time after the fire, and by failing to designate a time and place and an officer before whom such examination should occur, has not put itself in a position to urge the refusal of the insured to submit to an examination as a defense to this action."

The written demand shows for itself that no time or place was named for the examination, no person before whom it should take place is named, and, however willing the parties may have been to acquiesce in the demand, it left them in ignorance of the person before whom they

should appear, or the time and place of their appearance. The court therefore correctly found that the plaintiffs did not refuse to submit to an examination under oath by any person named by the defendant companies.

The eleventh assignment complains of the amount of the judgment entered by the district court, claiming it to be excessive. It would unduly extend this opinion, and be of no benefit to the profession, to review the evidence relating to the amount of loss and damage. If the question was before us as an original proposition, we would not, perhaps, give judgment for the full amount allowed by the district court. There is, however, evidence amply sufficient to sustain its findings, and in this state of the case we cannot interfere. The case was apparently tried with care, and certainly nothing was omitted on the part of the defendants below in making their defense.

No reversible errors being shown in the record, we recommend an affirmance of the judgments in the several cases.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgments of the district court are

AFFIRMED.

DAVID T. BRINEGAR ET AL., APPELLEES, v. JOHN E. COPASS,
APPELLANT.

FILED OCTOBER 4, 1906. No. 14,416.

Waters. The overflow waters of a stream, especially where they run in a well-defined course and again unite with the stream at a lower point, must be regarded as a part of the watercourse from which the overflow comes and cannot be regarded or dealt with as surface water. *Chicago, B. & Q. R. Co. v. Emmert*, 53 Neb. 237, approved and followed.

APPEAL from the district court for Richardson county:
WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

Reavis & Reavis, for appellant.

A. J. Weaver and E. Falloon, *contra.*

DUFFIE, C.

John E. Copass, the appellant, owns 80 acres of land in Richardson county lying in the valley of the Nemaha river. Brinegar, one of the appellees, owns the farm adjoining on the west. The river runs through a portion of Brinegar's farm, and it also forms the south boundary line of the Copass land. The river is subject to overflows, and at such times the flood waters run from Brinegar's land eastward upon and over the land of Copass. Some four or five years prior to the commencement of this action, Brinegar and Copass built an embankment or dike on the bank of the river on the land of Brinegar for the purpose of preventing an overflow. This dike was constructed at the joint expense of Brinegar and Copass, but, partly on account of complaint of adjoining landowners that the dike caused a serious overflow of their lands, and of threatened suits for damages, Brinegar determined to cut the dike, and, thereupon, Copass commenced the construction of an embankment along the west line of his land running from the river to the foothills. This embankment was constructed wholly upon his own land and from dirt taken from the west side of the embankment, thus forming a ditch the whole length of the dike, which, Brinegar claims, has the effect of allowing the water of the river to enter the ditch and overflow a considerable area of his farm. This action was brought by Brinegar to enjoin the construction of said dike and ditch, and Tiehen, who owns a large body of land on the opposite side of the river, intervened in the action, alleging that the effect of the dike would be to overflow about 320 acres of his best

land during times of high water, and he joined with the plaintiff in asking an injunction. A decree was entered by the district court requiring Brinegar to destroy the old dike or embankment that was erected by himself and Copass, and requiring Copass to destroy and tear down the embankment described in plaintiff's petition, and from this decree Copass has appealed.

In an able and exhaustive brief filed by the appellant it is argued that the overflow of waters of the stream are surface waters against which every proprietor has a right to protect himself and we are asked to review the case of *Chicago, B. & Q. R. Co. v. Emmert*, 53 Neb. 237, in which it was said: "The flood water of the Nemaha river involved in this case *held* not to be surface water, but a constituent part of such stream—a natural watercourse." The courts of the different states are apparently hopelessly divided upon the question of whether flood waters are a part of the stream from which the water finds its way to the adjoining lands to be dealt with as water of a running stream, or whether they are surface waters and subject to the rules applicable thereto. In the case cited the question was fully examined and the conclusion therein reached after elaborate argument by counsel and apparent careful consideration. We see no reason for departing from the rule of that case, and a quite exhaustive examination of the question convinces us that the courts which formerly held to the surface water theory are modifying or overruling their former decisions and getting in line with those that regard overflow waters as a part of the river itself. It is true that flood waters may become entirely separated from the stream and so have lost their identity with it. When it has spread over the adjoining country, settled in low places, and become stagnant, it can no longer be treated as a part of the stream, and the rules with respect to watercourses can then no longer be applied. But overflow waters from a natural stream in times of flood or freshet, flowing over or standing upon adjacent lowlands, do not cease to be part of the stream unless or until sep-

arated therefrom so as to prevent their return to its channel. 3 Farnham, Waters and Water Rights, sec. 879. In *Uhl v. Ohio River R. Co.*, 56 W. Va. 494, 68 L. R. A. 138, the supreme court of West Virginia made an elaborate examination of the authorities, and approved the rule announced in *Chicago, B. & Q. R. Co. v. Emmert*, *supra*, and Judge Baker, of the United States district court for the district of Indiana, refused to follow former decisions of the supreme court of that state, and, in an able opinion, held that the flow of a river, when swollen beyond the low water mark by the hard rains which fall in wet seasons, or by the melting of snows, does not constitute surface water which may be turned by embankments. *Cairo, V. & C. R. Co. v. Brevoort*, 62 Fed. 129, 25 L. R. A. 527. In a late case, *Fordham v. Northern P. R. Co.*, 66 L. R. A. 556 (30 Mont. 421), the supreme court of Montana reviews the cases upon the subject and announces the following rule: "Flood water of a river which forms a continuous body with the water flowing in the ordinary channel, or which has departed from the channel presently to return, must be regarded as a part of the stream in considering the right to obstruct its flow." The evidence in this case establishes, we think, without any controversy, that the waters of the Nemaha river, in times of freshet, flow across the Copass land and empty into the Nemaha river again about a mile distant therefrom. This, we think, under all the authorities, constitutes such overflow a constituent part of the stream, and we have been cited to no authority, nor have we, in our search, been able to find a case holding that overflow water, which leaves the ordinary bank of the stream in times of freshet, again joining the stream at a lower point thereon, is regarded or held to be surface water. The holding of the district court was undoubtedly right, and we recommend an affirmance of the decree.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

CHARLES D. MORROW, APPELLANT, V. ALEXANDER LAVERTY,
APPELLEE.

FILED OCTOBER 4, 1906. No. 14,426.

1. Evidence examined, and *held* not only to support, but to require the judgment appealed from.
2. Verdict: EVIDENCE: REVIEW. Where the verdict returned is the only one which could be sustained under the evidence, errors assigned in giving or refusing instructions will not be discussed.

APPEAL from the district court for York county:
ARTHUR J. EVANS, JUDGE. *Affirmed.*

France & France and Meeker & Wray, for appellant.

Hainer & Smith and F. C. Power, *contra*.

DUFFIE, C.

In 1901 the plaintiff and appellant was the owner of a stock of drugs, together with the store fixtures, located in a building in the town of Ashland, Nebraska. The defendant and appellee owned a quarter section of land in Sherman county, Nebraska, upon which were certain improvements. At that time both parties resided in Ashland, and on the 29th of March, 1901, the plaintiff traded his drug stock and store fixtures to the defendant for the Sherman county land, giving a mortgage on the land for \$568 as boot money. In August, 1903, plaintiff brought this action against the defendant in York county, where service was obtained, alleging in his petition that the defendant fraudulently misrepresented the value of the land, the nature and value of the improvements thereon, and the

rental value thereof. He further alleges that, while the defendant represented the land to be worth \$23 an acre, its fair market value did not exceed \$900; that its rental value was not more than \$50 per annum, while the defendant represented it to be \$200; that his stock of goods and fixtures were worth \$4,000, and that he has been damaged by the false and fraudulent representations of the defendant, upon which he relied in making the exchange, in the sum of \$3,668, for which sum he prays judgment. His petition further states that at the time of making the trade, and for some time previous thereto, he was addicted to the use of intoxicating liquors to such an extent as to be greatly weakened in mind and body, and that he had no reasonable or adequate comprehension of the nature of the transaction, of which the defendant had knowledge and took advantage. The answer, after admitting the trade as alleged by plaintiff, asserts that, prior to the exchange, the plaintiff made a personal examination of the Sherman county land and fully acquainted himself with the situation, character and value thereof and the improvements thereon, and had full and actual knowledge thereof; that he had taken possession thereof and, until a short time before commencing the suit, had collected the rents, issues and profits therefrom, and had then sold the same. The answer further contains a general denial of all facts alleged in the petition and not admitted in the answer. For reply, the plaintiff admits that he visited the land prior to the trade, but says that he was in such an enfeebled condition from the excessive use of intoxicating liquors that he was unable to comprehend the situation, character or value of the land or the improvements thereon. A trial to a jury resulted in a verdict for the defendant, upon which the district court entered judgment, and the plaintiff has appealed to this court.

The evidence is quite voluminous, but may be epitomized as follows: The plaintiff, who is a physician, came to Ashland sometime in the fall of 1900, and purchased a drug store from one Hull. About two months prior to the

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trade in question he was married and set up housekeeping. Harry Hull and R. Overton were his clerks in the drug business. Neither of the clerks were called to show excessive drinking by the plaintiff, and the only witnesses offered on that question having personal knowledge of the fact were the plaintiff himself and his two sisters, neither of whom were in Ashland after the early part of March, 1901, and but a short time prior to that date. The sisters testified that he was drinking heavily, and gave it as their opinion that as a result he was incapacitated from doing business. The plaintiff himself testified that for some time prior to the trade he had been drinking to excess and that he "was weakened both physically and mentally in that way"; at the same time he admits that he did all the buying for his store up to the time of the trade, that he waited on customers, and attended generally to the business. It is conceded that prior to the trade he accompanied the defendant on a visit to the land, and had every opportunity to examine it and to inspect the improvements thereon. Relating to this trip the plaintiff himself testified as follows: "I haven't any recollection of seeing this land. I remember we started for the land, but I never knew where we got to or when we came back. About the only thing I remember was that I was in a caboose and that I was very sick; that is about the only recollection I have of the trip." In order to visit the land the parties went by train from Ashland to Lincoln, from Lincoln to Litchfield, and from there by wagon to the land in question, a total distance of about 170 miles. The defendant, who was with him during the whole trip, says that he was perfectly sober during the time; that they had no liquors with them; that they drove from Litchfield to the land, drove over it, made an examination of the land, then drove to the house, the plaintiff going in, remaining some time, after which they drove back to Litchfield, got a hasty supper and, as the passenger train east did not stop at that station, took a freight train to Ravenna where they boarded the passenger sometime about midnight, getting

back to Ashland the next morning. Dr. Meredith, a resident of Ashland, went to Lincoln on the same train with Morrow and Lavery on their trip out to see the land. He conversed with the plaintiff, who told him that "he was on his way to look at a piece of land he was about to trade his drug stock for, * * * that if the land was what he expected he was going to trade. * * * He was not intoxicated; there was no indication of intoxication." George Rightnour, a tenant on the land in question, testified that Morrow and Lavery came to the land in a buggy; that they drove over the farm after which they drove to the house where the plaintiff alighted, went into the house and remained some time; that he made inquiries about the soil, its productiveness, and other general inquiries about the farm. Questioned about the plaintiff's condition as to sobriety, he said he did not observe any evidence of intoxication, that his walk was "sober and straight" and his conversation intelligent. The next morning after returning from Sherman county the trade was made. The papers evidencing the transfer were drawn by H. A. Wiggenhorn, president of the Farmers & Merchants Bank of Ashland, and executed by the parties in the waiting room of the bank. Mr. Wiggenhorn states that, so far as he observed, the plaintiff was perfectly sober, that he saw nothing unusual about him, and that his conversation was perfectly rational.

Aside from the improbability of a person being so much under the influence of liquor, or so weakened physically and mentally by its use as to be unconscious of his doings and surroundings for a period of 48 hours, the fact that during that time he made a journey by railroad and wagon of more than 300 miles, without such condition attracting the attention of those with whom he came in contact and conversed, is ground amply sufficient to warrant a finding by the jury against the truth of his contention. If, as admitted, the plaintiff visited and examined the farm for which he traded, and if, as found by the jury, he was in condition to know and comprehend the

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business upon which he was engaged, then, as said by the trial court in his instructions to the jury, it will be presumed that he acted upon his own judgment of the character and value of the land and improvements thereon, instead of the representations made by the defendant.

Complaint is made of certain rulings of the court in refusing evidence offered by the plaintiff, and the admission of evidence offered by the defendant. Certain of the instructions to the jury were also excepted to by the plaintiff. A discussion of these assignments would be of no benefit to the profession. A careful reading of the whole record produces an abiding conviction that the verdict returned by the jury is the only one which a court could sustain, and, this being the case, the errors complained of in the instructions, if error there was, are without prejudice and immaterial.

We recommend an affirmance of the judgment.

ALBERT, C., concurs.

JACKSON, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOHN SEBESTA ET AL., APPELLEES, V. SUPREME COURT OF
HONOR, APPELLANT.

FILED OCTOBER 4, 1906. No. 14,443.

1. An affidavit, under our statute, must have attached the certificate of the officer before whom taken that the oath was administered by such officer.
2. To constitute suicide by one not insane, there must be intentional self-destruction.

APPEAL from the district court for Cass county: PAUL
JESSEN, JUDGE. *Reversed.*

W. B. Risse and A. L. Tidd for appellant.

Matthew Gering, contra.

DUFFIE, C.

The appellees, who were plaintiffs in the court below, brought this action to recover from the appellant, the Supreme Court of Honor, the amount of a certificate issued to Anton Sebesta. They claim to recover on the certificate as the only heirs at law of the insured. The answer set up two defenses: First, that appellees were not the beneficiaries under the certificate; and, second, that the deceased committed suicide. The appellees are all residents of Bohemia, and claim to be the father, mother, brother, and sisters of the deceased. To avoid the expense of taking a formal deposition to prove this relationship, the parties entered into a stipulation that the affidavit of the plaintiffs in the Bohemian language and a translation thereof into English might be offered in evidence by the plaintiffs in proof of such relationship to the same extent and in the same manner as if the depositions of the said plaintiffs were regularly taken upon proper notice and before proper authority, the defendant reserving the right to object to the competency, relevancy or materiality of the testimony disclosed by such affidavit. Under this stipulation a paper signed by the plaintiffs, and reciting their relationship to the decedent, was offered in evidence and received by the court, over the objections of the defendant, as an affidavit of the parties. The jurat attached is in the following language: "I hereby declare that I am personally acquainted with Johann Schebesta and his wife, Katharina Schebesta, senior, householders; Joseph Schebesta, laborer, and Augustine Schebesta, laborer, all living in Hradaschitz, M. C. 59; and Katharina Holub-nee-Schebesta, householder, in Hradaschitz, M. C. 29, and that they have signed this instrument with their own hands. Horazdiowitz, June 24, 1904. Josef Rosenauer, Imperial Notary Public. Fee 1 K. 80t. (Stamp.)"

It will be noticed that the jurat attached to the so-called affidavit does not recite that the parties were sworn by the notary or that the statements therein contained were made under oath. The defendant insists that the paper presented was not an affidavit within the meaning of our statute, and that the same was improperly admitted. This requires us to determine the method in which an affidavit must be authenticated in this state. Section 367 of the code defines an affidavit in the following language: "An affidavit is a written declaration under oath, made without notice to the adverse party." Section 371 is as follows: "An affidavit may be made in and out of this state, before any person authorized to take depositions, and must be authenticated in the same way, except as provided in section 118." Section 118 relates exclusively to an affidavit verifying pleadings and, by its terms, needs no authentication further than the certificate of the officer taking the same, which is sufficient proof, whether he have a seal or not, that the affidavit was duly made, that the name of the officer was written by himself, and that he was in fact such officer. Section 384 relates to the method of authenticating depositions. It provides that, when taken here or elsewhere before an officer having a seal of office, the depositions shall be admitted in evidence upon the certificate and signature of such officer under his seal. If he have no seal and the deposition be not taken in this state, then it shall be certified and signed by the officer, and shall be further authenticated either by parol proof adduced in court or by the official certificate and seal of any secretary or other officer of state keeping the great seal thereof, or of the clerk or prothonotary of any court having a seal attesting that such judicial or other officer was, at the time of taking the same, within the meaning of this chapter, authorized to take the same. Section 385 provides that the officer's certificate, among other things, shall show that the witness was sworn. The so-called affidavit in this case recites the following: "John Sebesta, Katharina Sebesta, Sr., Katharina Sebesta, Jr.,

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Frank Sebesta; Augustine Sebesta and Joseph Sebesta, being each duly sworn upon their oaths depose and say that they reside at Hradesic, Kingdom of Bohemia," etc. Defendant in error insists that this recital of the statements in the affidavit being made under oath, and the certificate of the notary showing that the paper was signed by the parties, raises the presumption that they were duly sworn. *Bantley v. Finney*, 43 Neb. 802; *Turner v. St. John*, 8 N. Dak. 245; *Cox v. Stern*, 170 Ill. 442, and *Kleber v. Block*, 17 Ind. 294, are cited to show that the jurat is no part of an affidavit, and need not be attached. It is undoubtedly true that the courts are nearly unanimous in holding that the jurat is no part of an affidavit, and that where no jurat is attached parol evidence may be used to show that it was in fact sworn to, when the statute does not require written evidence of that fact, but they all agree that it must in some manner appear that the oath was in fact administered. As suggested in *Cox v. Stern*, *supra*, and in *Turner v. St. John*, *supra*, it is only when no form is prescribed for the affidavit, or for preserving the evidence of the oath, that parol proof may take the place of the official certificate. It is, we believe, fundamental law that parol testimony will not be received to establish any fact of which the statute requires written evidence. *Rosholt v. Corlett*, 106 Wis. 474. It is also well established that parol proof is not admissible to supply defects or omissions in the certificate to a deposition. 13 Cyc. 970; *Pingry v. Washburn*, 1 Aik. (Vt.) 464, 15 Am. Dec. 676. Another suggestion might be offered relating to the requirements of our statute. In the enactment of section 384 of the code, the legislature had under consideration the matters which might be established by parol proof in authenticating a deposition, and it provided that parol proof might be adduced in court of the official character of the officer before whom the deposition is taken, but the official acts done by the officer must, under the provisions of that section, be shown by his own certificate. *Holmes v. Crooks*, 56 Neb. 466. In the opinion in *Bantley v. Fin-*

ney, *supra*, the provisions of section 371 were apparently overlooked; at least the effect of that section was not discussed or referred to. We are clearly of the opinion that under the provisions of our statute an affidavit must bear upon its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same.

The objection urged against the instructions of the court cannot, with the exception of the tenth instruction, be considered. In the motion for a new trial the objections were taken to the instructions *en masse* and, as some of them are clearly right, the exceptions, under frequent decisions of this court, are unavailable. The policy contained a provision that the order would not pay benefits to members who committed suicide, whether sane or insane, unless committed in delirium resulting from illness, or while the member is under treatment for insanity or has been judicially declared to be insane. In all cases not within the exception, the money contributed to the benefit fund by the member shall be returned and paid the beneficiary out of said fund in lieu of the benefits. Defendant asked an instruction in the following language: "You are instructed that if you believe from the evidence that said Anton Sebesta committed suicide by taking internally match heads of phosphorous matches, it is immaterial whether he was sane or insane, and your verdict should be for the defendant, unless you find that such match heads were taken while said Sebesta was in a delirium resulting from illness." The court modified this instruction by inserting after the word "matches" the following phrase: "With intent to kill himself." The court did not err in modifying the instruction. There was no sufficient evidence to submit to the jury the question of the insanity of the deceased, and all the authorities agree that suicide by a person not insane means an intentional self-destruction.

For the error in admitting in evidence the so-called affi-

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davit, we recommend a reversal of the judgment appealed from and that the cause be remanded for another trial.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment appealed from is reversed and the cause remanded for another trial.

REVERSED.

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UNION PACIFIC RAILROAD COMPANY V. JOHN T. CONNOLLY.

FILED OCTOBER 4, 1906. No. 14,205.

1. **Verdict.** A verdict is the unanimous decision made by a jury and reported to the court on the matters lawfully submitted to them in the course of the trial of a cause, and under our practice must be in writing and signed by the foreman.
2. ———. A mere statement by the foreman in open court that the jury have agreed, without stating the nature of the decision they have agreed upon, is not a verdict.
3. **Trial: WAIVER.** On the trial of a cause where two parties were joined as defendants, the jury were called into court and asked if they had agreed upon a verdict. The foreman answered that they had agreed as to one of the defendants, naming him, but not as to the other, not stating the nature of their decision. The court expressed a doubt as to its right to receive a verdict as to one defendant without a verdict as to both, and asked counsel for suggestions, and, receiving no response, it discharged the jury without receiving a verdict as to either defendant. No objection was made or exception taken to such course. *Held*, That the error, if any, was waived.
4. **Verdict.** After the jury were discharged the foreman delivered a package of papers to the bailiff, who in turn delivered them to the court. Among the papers was what purported to be a verdict in favor of one of the defendants, signed by the foreman. It was delivered at a time and under such circumstances as to afford no opportunity to poll the jury or apply the ordinary tests to determine whether it was the unanimous decision of the jury. *Held*, The trial court properly refused to treat the paper purporting to be a verdict as the verdict of the jury.

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5. **Railroads: REASONABLE CARE: QUESTION FOR JURY.** Where a railroad company for many years has permitted the public without objection to cross its tracks at a certain point, not in itself a public crossing, it owes the duty of reasonable care toward those using such crossing, and whether such care has been exercised is ordinarily a question for the jury.
6. ———: ———: ———. The mere fact that warning of the approach of a freight train or portion of a freight train, backing upon and over such crossing, was given by ringing the bell and sounding the whistle does not of itself show that the defendant company had discharged its full duty to those using the crossing. Whether, in view of the time, place and circumstances, further precautions were required is, ordinarily, a question for the jury.
7. **Negligence: EVIDENCE.** That the crossing was located in a populous district and over a system of tracks and switches within the corporate limits of a city; that it was in common use day and night by a large number of people; that such use had been so extensive and long continued that the defendant company was chargeable with notice of it; that a portion of a freight train was backed upon and over the crossing without displaying any lights on the rear car, or having any person stationed on such car, or at the crossing, to give warning of its approach—would warrant the inference of negligence on the part of the company operating the train, although the bell was rung and whistle sounded.
8. **Evidence examined, and held sufficient to sustain a finding that plaintiff was injured as a proximate result of a failure on the part of the defendant company to give due warning of the approach of a train backing upon and over such crossing, and that the plaintiff was not guilty of contributory negligence.**
9. **Harmless Error.** Where contributory negligence is relied upon as a defense, it is error to instruct the jury that, where negligence on the part of the plaintiff is disclosed by him in making his case, the burden of proof is upon him to show that he was not guilty of contributory negligence; but as to the defendant it is error without prejudice.
10. **Instructions: REVIEW.** An instruction which states that it is the duty of a person at a railway crossing to look and listen for approaching trains is not erroneous because of the omission to state the direction in which such person is required to look, especially when a more specific instruction is not asked by the complaining party.
11. **Harmless Error.** Where the entire answer of a witness to a ques-

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tion is excluded, but substantially the same matter, so far as competent, is received in answer to a subsequent question, the error in excluding the former answer, if any, is cured.

12. **Evidence: REVIEW.** Certain evidence tendered by the defendants examined, and *held* properly excluded.
13. **Damages.** On the facts stated, *held* that a verdict of \$27,500 as damages for an injury resulting in the amputation of both legs about five inches below the knee is not excessive.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

John N. Baldwin and Edson Rich, for plaintiff in error.

T. J. Mahoney and J. A. C. Kennedy, contra.

ALBERT, C.

On the 11th day of August, 1902, John T. Connolly was struck and run over by a train, or part of a train, of freight cars operated by the Union Pacific Railroad Company, while attempting to cross the tracks of said company at South Omaha. One foot was entirely cut off in the accident, and both legs were so mangled as to necessitate their amputation about five inches below the knee. He brought suit against the railroad company and Elmer E. Fair, the engineer of the train which inflicted the injury, for damages resulting therefrom, charging that such injuries were occasioned by the negligent operation of the train and the defendant's road at the place where the accident occurred. The plaintiff alleges in his petition that he was struck by the train while crossing the tracks on a crossing which at the time was, and for many years had been, in common use as a public crossing. The negligence charged against both defendants is that the train in question was backed upon and over this crossing without any warning of its approach by the ringing of the bell or sounding of the whistle. The charges of negligence against the defendant company alone are: (1) That the train was backed upon and over the crossing without dis-

playing any light at the end of the train approaching the crossing; (2) that no employee was stationed at the end of such car to give warning of the approach of the train; (3) that it had no flagman or watchman stationed at the crossing. The defendant company filed a petition and bond for the removal of the cause to the federal court on the ground of diverse citizenship, claiming that Fair had been made a party defendant for the sole purpose of evading the jurisdiction of that court. The cause was removed but upon plaintiff's motion was remanded to the state court. The defendants answered separately, denying the charges of negligence, and alleging contributory negligence. The cause has been tried four times in the district court. At the second trial, and after the jury had deliberated for some time, they were brought into court and asked whether they had agreed upon a verdict. Fair's attorney was not present at the time. The foreman answered that they had agreed as to the defendant Fair, but not as to the defendant company. They were then asked as to the possibility of their reaching an agreement upon further deliberation. They indicated that there was none. Thereupon, the presiding judge remarked: "I think I shall have to discharge you." The attorney for the defendant company then called the attention of the court to the statement of the foreman that they had agreed as to the defendant Fair, but the court expressed a doubt as to its right to receive a verdict as to one of the defendants without a verdict as to both, and asked counsel if they had anything to suggest. Receiving no response, the court discharged the jury. Afterwards, the foreman of the jury delivered a package of papers containing, among other things, a formal verdict in favor of the defendant Fair to the bailiff, who in turn delivered it to the court in the absence of counsel. They came into court shortly afterwards and their attention was called to this verdict. Plaintiff objected to receiving it as a verdict on the grounds that it had not been presented until after the jury had been discharged; that it had not been presented

at such time or in such a way as to afford the usual opportunities for determining whether it was the verdict of the jury, and that it was not the verdict of the jury. The record does not disclose what ruling was made on plaintiff's objection to receiving this verdict, nor what action was taken thereon by the court, but, as Fair was a party to the subsequent litigation in the district court, we infer that the objection was sustained and that the court refused to receive the verdict. The defendant company then filed a second petition and bond for the removal of the cause to the federal court on the ground of diverse citizenship. The court overruled this petition and retained the cause for trial. At the opening of the last trial the defendants objected to the jurisdiction of the district court on the ground that the cause was one properly removable to the federal court, and that the jurisdiction of the state court had been ousted by the filing of the second petition and bond for removal. This objection was overruled. At the close of the testimony adduced by the plaintiff in making his case a motion was made by the defendant company for a verdict, which was overruled. Testimony on behalf of the defendants was then offered and received. At the close of the trial the defendant company again asked for an instruction directing a verdict in its favor, which was denied. The trial resulted in a general verdict for the defendant Fair, and a verdict and judgment against the defendant company for \$27,500. The company brings error.

The first three assignments of error are so intimately related that they should be considered together. They are based on the following rulings: (1) The refusal of the court to receive a verdict as to the defendant Fair at the second trial. (2) Overruling the defendant company's second petition for removal to the federal court. (3) Overruling the objections made to the jurisdiction of the court at the last trial. It will be recalled that the cause had been once removed to the federal court and by that court remanded to the state court for trial. The second

petition for removal on its face contains nothing that was not presented by the first petition. It is not claimed that the defendant company was entitled to a second order of removal on the same state of facts which had been held insufficient by the federal court when the cause was removed on the first petition, but that the defendant Fair was no longer a party to the controversy after the so-called verdict on the second trial, and, consequently, when the second petition for removal was filed, the controversy was solely between the plaintiff, a citizen of Nebraska, and the defendant company, a citizen of the state of Utah. In short, the second petition for removal was presented on the theory that Fair was eliminated from the controversy by the so-called verdict in his favor at the second trial. There is more than one reason why this theory cannot be sustained. In the first place, no verdict was rendered at that trial. A verdict is "the unanimous decision made by a jury and reported to the court on the matters lawfully submitted to them in the course of a trial of a cause." Bouvier, Law Dictionary. Section 291 of the code provides: "The verdict shall be written, signed by the foreman, and read by the clerk to the jury, and the inquiry made whether it is their verdict." Section 290 is as follows: "When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by the foreman. When the verdict is announced, either party may require the jury to be polled, which is done by the clerk asking each juror if it is his verdict. If anyone answers in the negative, the jury must be sent out for further deliberation." At the second trial, when the jury were brought into court and asked if they had agreed upon a verdict, the foreman merely said they had agreed as to the defendant Fair, but not as to the defendant company. No decision as to any matter lawfully submitted to them was reported to the court at that time; they merely reported that they had agreed upon a decision. It does not appear that at that time their decision had been reduced to writing or signed

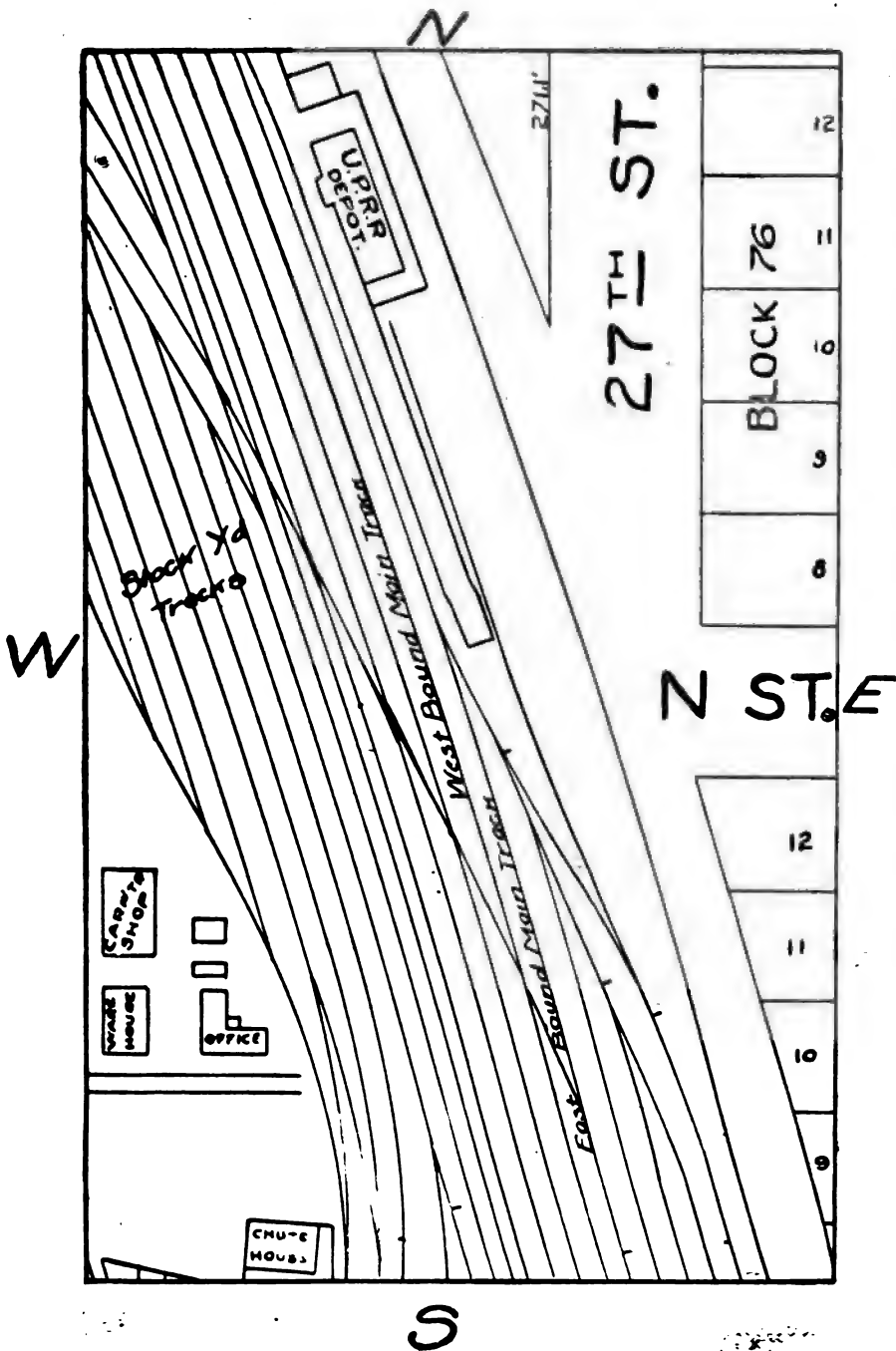
by the foreman. Certainly no verdict was announced, nor was any opportunity given to test the unanimity of their finding, and they were discharged without any one but themselves knowing the nature of their verdict with respect to Fair. It may be that the trial court at that time should have called for the verdict as to Fair, and that if it was in due form it should have been received, notwithstanding the inability of the jury to agree as to the other defendant. But, although the court openly manifested its intention not to call for or receive a verdict as to Fair and to discharge the jury, no protest or objection was made by any party to the record, nor was any exception taken to the rulings of the court in that regard. On the contrary, when the court asked counsel for suggestions as to the course to be pursued in the circumstances, its request met with no response, although the attorney for the party now complaining was present in court at the time. The error, then, if any, is one of which the defendant company cannot now be heard to complain. As to the so-called verdict subsequently delivered to the bailiff and by him delivered to the court, it was delivered to the court after the jury had been discharged. It was delivered at a time and under such circumstances as made it impossible to apply the tests prescribed by sections 290, 291, *supra*, to determine whether it was in fact the unanimous decision of the jury on any matter lawfully submitted to them, and the court properly ignored it. It might be said, in passing, that we find no exception to any ruling of the court in that behalf. It would follow, then, that as no verdict in favor of Fair had been rendered when the second petition for removal was filed and submitted, the theory upon which that petition was presented, namely, that Fair had been eliminated from the controversy by a verdict in his favor, falls to the ground.

Three other assignments are in effect as follows: (1) That the court erred in overruling the motion of the defendant company for a verdict at the close of the testimony adduced by the plaintiff in making his case. (2)

That the court erred in refusing to direct a verdict for the defendant company at the close of the trial. (3) That the evidence is insufficient to sustain a verdict in favor of the plaintiff and against the defendant company. As to the first, the rule is that if the defendant at the close of the testimony adduced by the plaintiff in making his case asks the direction of a verdict against the plaintiff, and after an adverse ruling on his motion introduces testimony in his own behalf, he thereby waives the error, if any, in the overruling of such motion. *Union P. R. Co. v. Mertes*, 35 Neb. 204, 39 Neb. 448.

The other two assignments both go to the sufficiency of the entire evidence to sustain the verdict and may be considered together. That the plaintiff sustained the injuries hereinbefore mentioned by being run over by a freight train, or part of a freight train, operated by the defendant company on its tracks at South Omaha between 3 and 4 o'clock in the morning of August 11, 1902, is conclusively established. The accompanying diagram represents with a fair degree of accuracy the *locus in quo*. The lines running diagonally from the northwest to the southeast of the diagram represent a system of tracks and switches maintained by the defendant company and the stock yards company at South Omaha; each track is represented by a single line instead of a line for each rail. The lines lying to the east belong to the defendant company; those to the west, to the stock yards company.

It is insisted that the place where the injury occurred was not a public crossing, and that plaintiff in attempting to cross the tracks at that point was a mere trespasser, or licensee, to whom the defendant company owed no duty. The defendant company's passenger station, the hotels, stores, etc., of the city are on the east side of the tracks. N street is the principal retail street, and the passenger station is not two blocks north of it. The stock yards, packing houses, and the offices and buildings used in connection therewith, and other places of business are west of the tracks. The evidence shows that for many years the



route taken by the plaintiff in attempting to cross the tracks had been in common use by pedestrians crossing and recrossing the tracks at all hours of the day and night, and that from 400 to 500 people cross the tracks by this route every morning and evening. The use of this crossing by the public had been so extensive and long continued that it could not have been without the knowledge of the defendant company, and as it never objected to such use, nor took any steps to prevent it, such use must have been with its consent. In short, the evidence shows that the defendant company for many years and without objection permitted the public to cross its tracks at this point. That being true, it was bound to exercise reasonable care in the operation of its trains to guard against injury to those using the crossing. *Taylor v. Delaware & H. C. Co.*, 113 Pa. St. 162; *Keller v. Erie R. Co.*, 90 N. Y. Supp. 236; *Clampit v. Chicago, St. P. & K. C. R. Co.*, 84 Ia. 71. See also the following: *McCarty v. New York C. & H. R. R. Co.*, 76 N. Y. Supp. 321; *Boggero v. Southern R. Co.*, 64 S. Car. 104, 41 S. E. 819; *Bullard v. Southern R. Co.*, 116 Ga. 644, 43 S. E. 39; *Kroeger v. Texas & P. R. Co.*, 30 Tex. Civ. App. 87, 69 S. W. 809; *Blankenship v. Chesapeake & O. R. Co.*, 94 Va. 449, 27 S. E. 20; *Thomas v. Chicago, M. & St. P. R. Co.*, 103 Ia. 649, 72 N. W. 783; *Hooker v. Chicago, M. & St. P. R. Co.*, 76 Wis. 542, 44 N. W. 1085; *Jones v. Charleston & W. C. R. Co.*, 61 S. Car. 556, 39 S. E. 758; *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641; *Swift v. Staten Island R. T. R. Co.*, 123 N. Y. 645; *Chicago, B. & Q. R. Co. v. Russell*, 72 Neb. 114.

The evidence relied upon to show negligence in the operation of the train causing the injury and to sustain the charge of contributory negligence covers a large portion of a bill of exceptions containing over 1,000 pages. We cannot undertake to review it at length, but a somewhat extended statement of the facts and evidence can hardly be avoided in view of the questions presented. On the morning of the accident the plaintiff and some other stockmen arrived at South Omaha on a Burlington

freight train from the west. One car of stock belonging to the plaintiff was attached to the train. This train pulled in west of the tracks, shown by the diagram, and discharged its passengers two blocks north and about three blocks west of N street. The plaintiff and some of his companions on leaving the train went east, crossing the tracks by what is known as the L street viaduct to Twenty-seventh street, thence down that street to N street. It was necessary for the plaintiff to go to the chute house, located diagonally across the tracks from the corner of Twenty-seventh and N streets, in order to make arrangements for the disposition of his car-load of stock, which arrived on the train he had just left. He and one of his companions crossed the tracks and went to the chute house. At least one member of the party remained on the other side. While the plaintiff and his companions were in the chute house, the defendant company's freight train, which it is claimed caused his injuries, arrived from the west, moving north, according to the diagram, on what is designated as the "east bound main track." This train consisted of at least 35 cars, 16 of which were loaded with stock for the South Omaha market. The stock cars were from four to six cars behind the engine, and the remainder of the train was behind the stock cars. In order to cut out the stock cars and shift them from the tracks of the defendant company to those of the stock yards company, it was necessary for the train to pull north some distance beyond the point where the plaintiff was injured, switch over to the west bound track, back down that track to some distance south of said point, then uncouple the rear stock car from the cars following it, and pull north of the point where the plaintiff was injured a sufficient distance to enable a switch engine to move the stock cars to the stock yards tracks. After this was done the engine, with the four or six cars attached to it, was backed south on the west bound track, and past the point where the plaintiff was injured, to take up that portion of the train that had been left standing there while the stock cars were being shifted.

While the train was being thus shifted about, one of the defendant company's passenger trains passed through South Omaha, moving northward through the city on the east bound main track. That the plaintiff was struck and run over by the freight train, or some portion of it, while the passenger train passed over the crossing where the accident occurred is, to our minds, conclusively established, if not tacitly admitted. The plaintiff's theory is that he was struck by the rear car as the engine backed down the west bound main track with the four or six cars to take up the remaining cars after the stock cars had been set out. The defendant's theory is that the plaintiff was struck by the caboose at the rear of the freight train as it backed down the west bound main track the first time in order to cut out the stock cars, or that he fell under the train at that time while attempting to crawl between, over or under the cars while the train was in motion. The evidence is conclusive that the caboose was well lighted and that the usual signals of warning were given as the train backed down and over the crossing the first time. So that if the plaintiff was injured at that time his injury is no way traceable to any negligence on the part of the defendant company. If he fell under the train while attempting to crawl between the cars, or over or under the train while it was backing down, it goes without saying that the company would not be liable. The question, then, is whether the evidence is sufficient to sustain a finding that he was struck by the rear of the four or six cars that were backed down to make up the train after the stock cars had been cut out.

The plaintiff testified that the accident occurred between 3 and 4 o'clock in the morning; that he and his companion left the chute house on the morning of the accident and started to cross the tracks to N street for the purpose of going to their hotel. They took what the evidence shows was the usual route taken by pedestrians crossing the tracks from the chute house. On the way they met a man who said to them: "Now, boys, look out for the train,"

and as he spoke they looked south and saw the passenger train, hereinbefore mentioned, approaching on the east bound main track. There was then one or two tracks between them and the east bound main track. The following is a portion of his testimony as to what occurred from that time forward: "308. Q. As you continued on toward the foot of N street, from the time you met Mr. Paxton until you reached the point where you got hurt, what, if anything, did you do in the way of keeping watch upon your surroundings? A. I kept watching up and down the tracks both ways, as we walked on. 309. Q. What, if anything, did you do during that time to observe what, if anything, there was to the north of you? A. There were cars to the north of us. 310. Q. What did you do as you came along there? A. I just kept looking backwards and forwards up and down the track. 311. Q. Constantly? A. Yes, sir. 312. Q. And, in doing that, state whether or not there were any objects to the north of you? A. There were. 313. Q. What were there? A. I suppose, cars. 314. Q. Were they in motion or standing still? A. They appeared to be standing still. 315. Q. Were there any lights upon any of those cars that you saw to the north of you as you came on to the northeast? A. None that I saw; no, sir. 316. Q. Were there upon any of those cars? A. No, sir. 317. Q. Did you observe any of them move at all, while you were coming along in that direction? A. I did not. 320. Q. What was the condition of your sight? A. I had good eyesight. 321. Q. State whether or not you also watched this train that you spoke of as you continued to move on to the northeast. A. This passenger train, or this train that was coming? Yes, sir. 322. Q. This passenger train? A. Yes, sir. 328. Q. Did you get far enough to know whether you could cross in front of that train? A. I did. 331. Q. What were you doing up to the time that you were struck, from the time that you met Mr. Paxton? A. I had been traveling right along up until just that moment. I could not say positively whether I had just stopped, or was just in the act of stop-

ping, when I got hurt. 332. Q. If you had stopped, what was it for? A. To let this train go by. 333. Q. That is the train that was coming up from the south? A. Yes, sir. 334. Q. State whether or not you had kept up your looking to the right and left as you came along in that way until you were struck? A. I had. 336. Q. Up to the time you were so struck had you seen any car or train moving to your left or to the north of you? A. I had not. 337. Q. Had you seen any light upon any car to the north of you up to that time? A. I did not. 338. Q. Or did you at the time you were struck? A. No, sir. 542. Q. I am not sure but that I covered this question, but I will ask it again. Referring to the time of the injury, state whether or not at any time, from the time you started from the chute house until you were struck and run down, there was any light upon any car, or near any car, to the north of you? A. No, sir. 543. Q. And whether there was any light shining about you at or immediately before you received the injury or were knocked down? A. Nothing but the passenger, a light from the passenger train. 545. Q. None but that? A. None but that; no, sir. 546. Q. Any from the other side? A. No, sir. 1090. Q. You have ridden upon trains a good many times? A. Yes, sir. 1091. Q. You know they show some signals on the rear of all trains both by day and by night? A. Yes, sir. 1092. Q. You have noticed them on the rear of the caboose, have you? A. I have. 1093. Q. And the red lights that they display by night? A. Yes, sir. 1094. Q. And on this morning in question, as you started across the tracks, did you see something that would indicate to you to the north of the course that you were taking, that that there was a passenger train standing there, a passenger coach, or a caboose, by reason of the red lights on the rear end? A. I did not. 1095. Q. And as you continued on in that direction after the time you had met Mr. Paxton until you were struck, did you see anything of that kind to the north of you? A. I did not."

The testimony of his companion, covering the same

period, is as follows: "1277. Q. From the time that you and Connolly left the chute house until the time he was knocked down and run over, had you observed cars standing upon any of the tracks either way from you, as you came along? A. Yes, sir. 1278. Q. Which way had you observed cars standing? A. They were to our left. 1279. Q. To the left up the track? A. Yes, sir. 1280. Q. Did any of the cars which stood up to your left at the time have any lights on them? A. No, sir. 1288. Q. And was there any light or lantern upon any of those cars to your left as you came across? A. I did not see any. 1289. Q. What was the condition of your eyesight? A. My eyesight was good. 1295. Q. What sort of a view, if any, did you get of the car that knocked Mr. Connolly down? A. O, we did not get any view of it. It all occurred, you know (snapping his fingers), in an instant. I just saw this big black object passing over Connolly. 1296. Q. Coming right down on you? A. Yes, sir. 1297. Q. Was there any light on that that you could see? A. I saw none. 1298. Q. Was there any light flashed about you, at or immediately before you saw this big black object coming down on Connolly? A. No, sir. A. (continued) No, sir, there was no light."

Their companion who had remained on N street east of the tracks testified that he was there waiting for them to return when the passenger train came in; that at the same time he saw a freight train backing south on one of the tracks west of the track on which the passenger train was approaching; that he could see only the rear car, and that it displayed no lights, nor was there any person on the rear or top of the car; that after the passenger train had gone by he heard cries in the direction of where the accident occurred, and ran over, found the plaintiff lying beside the track, injured as before stated, and assisted in carrying him to the station and subsequently to the hospital. Another witness testified that he heard plaintiff's cries immediately after the accident, and upon investigation found him lying beside the rails of the west bound track.

We think it cannot fairly be said that the inference that the plaintiff was struck and run over by that portion of the freight train, consisting of four or six cars and the engine, which backed down and over the crossing after the stock cars had been cut out, is not one which might reasonably be drawn from the foregoing evidence. Of course, that evidence does not stand uncontradicted. It is irreconcilable with many facts and circumstances to which the witnesses produced by the defendants testified. On the other hand, it may be said that the testimony adduced by the defendants to rebut plaintiff's theory as to how the accident occurred is not, in every instance, easily reconcilable with the undisputed facts. The most that can be said on this branch of the case is that the evidence is conflicting and that it turns on the credibility of the witnesses. The jury were permitted to view the *locus in quo*. To pass upon conflicting evidence and the credibility of witnesses is within the peculiar province of the jury. On such questions their finding will not be disturbed unless clearly wrong. We consider the evidence ample to sustain plaintiff's theory as to how the accident occurred. Consequently, it stands as one of the questions settled by the verdict that the plaintiff was struck by the cars while the engine and the four or six cars were backing south on the west bound main track. That the rear car of that portion of the train displayed no lights, and that no person was stationed thereon, or at the crossing, to give warning of its approach to the crossing, are facts conclusively established by the evidence and practically conceded. The accident occurred in a populous community and within the limits of a considerable city. It occurred in the nighttime, and at a crossing in common use at all hours, and where, as we have seen, the defendant company was charged with the duty of exercising reasonable care to avoid injury to those crossing its tracks. It is true, it seems to be conceded that the bell was rung and the whistle sounded to give warning that the train was moving. But the mere fact that the statute requiring such warnings was complied with does

not of itself show that the defendant had discharged its full duty to those using the crossing. It was bound to use reasonable care not to endanger those who might be lawfully upon its tracks at the crossing, and whether, in view of the time, place and circumstances, precautions in addition to those prescribed by the statute were required, was a question for the jury. *Byrne v. New York C. & H. R. R. Co.*, 104 N. Y. 362; *McCarty v. New York C. & H. R. R. Co.*, 76 N. Y. Supp. 321; *Bullard v. Southern R. Co.*, 116 Ga. 644, 43 S. E. 39; *Missouri P. R. Co. v. Geist*, 49 Neb. 489. The crossing was in common use day and night. It was across tracks in constant use, and in a populous and busy community. That due care required more than ringing the bell and sounding the whistle to give warning of a freight train backing toward and over such crossing in the nighttime is certainly not an unreasonable inference in view of all the facts and circumstances. *Chicago, B. & Q. R. Co. v. Russell*, 72 Neb. 114.

But the defendant company contends that, even though its negligence be established, the evidence discloses such negligence on the part of the plaintiff contributing to the injury as to preclude a recovery. This contention is based on certain inferences which counsel draw from the testimony of the plaintiff and the man who accompanied him across the track, who are the only ones having actual knowledge of their acts after meeting the man who warned them to look out for the train. After reviewing their testimony at some length, counsel sum up in these words: "This testimony in short discloses that Connolly was familiar with the tracks at the point where the accident occurred, and so thoroughly had in mind the danger of crossing the tracks at that point that he mentioned it to Moore after leaving the chute house; that he knew the trains were liable to pass up and down the tracks at any moment; that he knew the noise made by the passenger train might drown the noise of signals made by any other train, and yet the conclusion, from the manner in which he was struck and thrown down, is irresistible that, when

the passenger train was a block and a half away, he was standing still between the rails of the west bound track, watching the headlight of the train approaching from the south, and taking no note of any train approaching from the north." It is undisputed that the plaintiff had been shipping stock from Wyoming to South Omaha for some ten years, was familiar with the tracks where the accident occurred, and was fully alive to the fact that for a pedestrian to cross the tracks was attended with more or less danger. It may be conceded, too, that the conclusion which counsel characterize as irresistible is one that might reasonably be drawn from the evidence. But we are unable to concur in the view that it is irresistible. We have heretofore set out a portion of the testimony of the plaintiff and his companion. Detached portions of the plaintiff's testimony might be interpreted to mean that "he was standing still between the rails of the west bound track, watching the headlight of the approaching train from the south and taking no note of any train approaching from the north," at the time he was struck by the freight train. But taking his evidence as a whole, it may reasonably be inferred therefrom that, after meeting the man who warned them to look out for the passenger train, they continued their way across the tracks until they reached a point from which they could see that they could not cross in front of that train; that he was struck by the freight train at the instant he stopped, or was about to stop, to wait until the passenger train had passed the crossing; that from the time he left the chute house up to the very instant he was struck he looked constantly up and down the tracks, north and south, to guard against danger from approaching trains; that, owing to the noise of the passenger train, the darkness, the nature of the plaintiff's surroundings at the time, and the failure of the defendant company to display any light on the rear of the freight train, or to station any person there, or at the crossing, to give warning of its approach, the plaintiff failed to discover that it was approaching until he was

struck. We do not wish to be understood to say that the foregoing facts are conclusively established, nor even that they are the most reasonable inferences to be drawn from the evidence. The most that we would be understood to say in this connection is that such facts are not unreasonable inferences from the evidence of the plaintiff and his companion. The settled rule in this state is that, where different minds might reasonably draw different inferences from the same state of facts, whether such facts establish negligence is a question for the jury, and not for the court. *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642, 39 Neb. 803; *Elliott v. Carter White Lead Co.*, 53 Neb. 458, and cases there cited. From the vantage ground of afterwards, it is easy to see how the plaintiff might have avoided the injury. When he saw the incoming passenger train he might have gone to some place of safety and waited for it to pass. He might, possibly, have stood between the tracks, or in the triangle formed by one of the switches nearby, or on other safe ground. But it must be kept in mind that a person having occasion to pass over a crossing like the one in question, where trains are constantly passing and repassing, can seldom wait for the tracks to be perfectly clear. He is not always able to tell just when he is between the rails of one track or between different tracks, nor to determine with accuracy the safest course to pursue. He is threatened with danger from every point, and cannot give his undivided attention to any one source of danger. His attention is distracted by unusual sights and sounds, and conditions are not favorable to the exercise of the best judgment. He has a right to presume that those operating trains will use due care for his safety. The law does not require him to exercise unerring judgment nor the highest degree of care, but merely that he exercise such care as a man of ordinary prudence would exercise under like circumstances. The jury have said by their verdict that the plaintiff exercised due care. That is their inference from the evidence. Other minds might reasonably reach a different conclusion,

but it cannot be said, we think, as a matter of law, that negligence on the part of the plaintiff is the only reasonable inference to be drawn from the testimony of these men.

The defendants offered the evidence of a witness taken at a former trial of the cause. Among other things this evidence shows that the witness had a conversation with the plaintiff immediately after the accident, in which he told how the accident occurred. One question to the witness was: "State to the jury what you heard Mr. Connolly (plaintiff) say." The answer was: "Well, me and Coulter walked up to him and says—asked him how this happened, and Connolly spoke very low. I am pretty certain that he said they tried to get through the cars, and crawled through the cars somewhere, and my impression was, at the time, they went over the bumpers between the cars." An objection to the answer offered was sustained, and the defendant company now complains of this ruling. That part of the answer stating the "impression" the witness had at the time was clearly incompetent. As to the rest, substantially the same matter was subsequently received as a part of the testimony of the witness. The ruling therefore deprived the defendant company of nothing it was entitled to.

The defendant company called the plaintiff's attorney as a witness, and after showing by him that on the former trials of the cause he had made the opening statement to the jury, in which he had stated that it was a freight train that run over the plaintiff, offered to show that he had never stated that it was four, six or eight cars that had run over him, previous to the last preceding trial. The offer was rejected, and the defendant company now claims it was entitled to show this fact, in view of its theory that it was the entire train, and not the portion attached to the engine after the stock cars were cut out, that inflicted the injury. We do not pretend to say how far a client may be bound, if at all, by an opening statement made by counsel at a former trial. But he certainly could not be preju-

diced by the fact that his attorney failed to distinguish clearly between a train and part of a train, or to state the number of cars constituting what he designated as a train. We think the evidence was properly excluded.

Several assignments of error are based on rulings of the court permitting the plaintiff to introduce the testimony of the conductor of the freight train taken on a former trial. This testimony was offered on rebuttal, and was in reference to the length of the train, the movements of the cars that remained with the engine when the train was divided at South Omaha to cut out the stock cars, the length of time required for the train to run from South Omaha to Council Bluffs, and the time it registered at Council Bluffs that morning. The objection urged against this testimony is that it was not proper rebuttal. We think it was. The defendants produced a larger amount of testimony tending to support the theory that the plaintiff had been injured either by being struck by the rear car while the whole train of some 36 cars was backing over the crossing, or by crawling between, over, or under the cars of that train. Had either of those theories been established, the plaintiff, as we have seen, would have been convicted of contributory negligence. The conductor's evidence offered in rebuttal tended to negative those theories and was properly received.

The defendant company complains of an instruction given by the court in these words: "The burden of proof is upon the plaintiff to establish by a preponderance of the evidence: (1) That the place where the plaintiff was injured was a crossing over defendant's railroad track which had been commonly used by pedestrians for such a length of time that defendant knew of its said common use, or by the exercise of reasonable care should have known it; (2) that the plaintiff was injured substantially as alleged; (3) that said injury was caused by the negligence of the defendants, the railroad company and Fair, or by defendant railroad company in some one or more of the ways charged in the plaintiff's petition; and (4)

the amount of damages occasioned thereby to the plaintiff, the defendants, and each of them, having alleged that, if the plaintiff received the injuries as alleged, the injuries were the result of the negligence of the plaintiff which contributed thereto; and the burden of proof of negligence on the part of the plaintiff is upon the defendants to establish by a preponderance of the evidence, unless you find that the evidence introduced by the plaintiff discloses negligence on his part which in any way caused or contributed to his injury, then it devolves upon the plaintiff, before he can recover, to prove by a preponderance of the evidence, not only that the negligence of the defendants, or either of them, caused his injury, but also that he himself was free from any negligence on his part. that contributed to his injury, and, in this case, you are instructed that, as a matter of law, the negligence of the defendant Fair, if you find from a preponderance of the evidence that he was negligent, would be the negligence of the railroad company." The first criticism of this instruction is that while the only joint charge of negligence against the defendants was the failure to ring the bell or sound the whistle on the train causing the injury, all the others being against the company alone, this instruction permitted a recovery against the defendant company alone, not only on the charges exclusively against it, but on the charge made against the defendants jointly. The criticism seems to be unfounded. The office of this instruction was to inform the jury as to the burden of proof. By subsequent instructions the jury were positively directed that on the matter of negligence in failing to ring the bell and sound the whistle, if they found such negligence, both defendants would be liable, but if there was no negligence in that particular, or if there was negligence in that particular, but it was not a proximate cause of the injury, neither defendant would be liable on the joint charge, and that plaintiff could not recover except on some other charge of negligence.

Another criticism on this instruction is that the rule

stated in the fourth paragraph as to the burden of proof on the question of contributory negligence is at variance with that announced by this court in *Rapp v. Sarpy County*, 71 Neb. 385, and *City of Beatrice v. Forbes*, 74 Neb. 125, where the doctrine that the burden of proof on the question of contributory negligence, under certain circumstances, may shift to the plaintiff was repudiated. In so far as the rule stated by the district court is at variance with the rule announced in those cases, it is more favorable to the defendants than it should have been, and they cannot be heard to complain of it on that ground.

Still another criticism of this instruction is that it "is upon the burden of proof and not upon the effect, as between the parties, of contributory negligence on the part of the plaintiff below that may be disclosed by the evidence, the instruction saying, in effect, that if the evidence introduced by the plaintiff does disclose contributory negligence, then the burden of proof is upon him to show that in fact he was not guilty of contributory negligence." While this part of the instruction is not framed in the clearest language, we do not think the jury were misled by it to the defendant company's prejudice. Negligence "which in any way caused or contributed to his (plaintiff's) injury" would not necessarily be contributory negligence. An act or omission, to constitute contributory negligence, must be something more than a remote cause in the chain of circumstances (*Lowrimore v. Palmer Mfg. Co.*, 60 S. Car. 153, 38 S. E. 430), but must be such as operates as the proximate cause, or one of the proximate causes, and not merely as a condition. *Smithwick v. Hall & Upson Co.*, 59 Conn. 261, 12 L. R. A. 279, 21 Am. St. Rep. 104. See, also, 2 Words and Phrases Judicially Defined, 1544. This part of the instruction, then, reasonably admits of the construction that, if the plaintiff's testimony disclosed that the injury was in any way related to any negligent act or omission of his, the burden of proof was upon him to show that such act or omission was not the proximate cause, or one of the prox-

imate causes, operating to produce the injury. This was at least as favorable as the defendants had a right to ask.

The court instructed the jury that it was the duty of the plaintiff to look and listen for the approach of trains, and the defendant company complains because the jury were not specifically instructed as to the directions in which he was required to look. If a more explicit instruction was desired on this point the party desiring it should have tendered one covering the ground. Neither of the defendants did so, and the instruction as it stands is not erroneous.

On the question of damages, the court instructed the jury as follows: "If you find for the plaintiff under the evidence and these instructions, in determining the amount of his recovery, you should take into consideration the nature and extent of his injuries, the fact that certain injuries are permanent, plaintiff's natural expectancy of life, any mental or physical pain which you find from the evidence he has suffered resulting from the injury, any expense necessarily incurred on account of the injury for surgical and medical care and hospital fees as shown by the evidence, his loss of earnings in the carrying on of his business since the injury which the evidence shows to have been caused by the injury, together with such future loss of earnings due to the injury as you find from the evidence to a reasonable certainty will be caused by the injury, and return a verdict for the plaintiff in such an amount as you so find under the evidence and these instructions will be a fair and reasonable compensation for such expense, loss of earnings in the past, and such loss of earnings in the future as you find to a reasonable certainty will result from his injuries, together with fair and reasonable compensation for such pain and suffering as you find to be established by the evidence. If you find for the defendants, or either of them, you will so state in your verdict." The objections lodged against this instruction are that it does not give any rule by which to estimate damages in cases of this kind, nor by which the

present value of future earnings may be determined. Instructions on the question of damages in cases of this character must of necessity be more or less indefinite. The instruction given is at least as definite and certain and as favorable to the defendants as that approved by this court in *City of South Omaha v. Sutcliffe*, 72 Neb. 746. No instruction was tendered by any of the parties covering the same subject, and the complaint now made against it should be overruled.

Complaint is made of certain acts of the trial judge committed, not while the trial was actually in progress, but during intermissions and adjournments. The complaint is that during such times he unduly manifested a friendly feeling, or interest, in the plaintiff in the presence of the jurors. This complaint was included in the motion for a new trial, and was supported by affidavits, which were met by counter affidavits. While these affidavits show that the learned judge treated the plaintiff with more familiarity and consideration than is generally shown a litigant by the trial judge, yet it does not appear that his treatment of the plaintiff differed substantially from that accorded by him to all others with whom he came in contact during the trial. While the record falls far short of convicting the trial judge of misconduct, or of showing that the defendant company was prejudiced by his conduct toward the plaintiff, it shows the advisability of a trial judge maintaining a proper distance between himself and the litigants before him in order to guard against the appearance of evil liable to arise from a failure to do so.

The attorneys for the plaintiff were also charged with misconduct in the motion for a new trial. That matter was submitted to the trial court on conflicting evidence, and its finding thereon cannot be disturbed.

It is also claimed that the court erred in overruling challenges for cause to certain jurors. Their examination on *voir dire* is set out at length in the record. This opinion is already too long, and it must suffice to say that the ex-

amination of these jurors, taken as a whole, shows that it was not error to overrule the challenges.

It is strenuously contended that the verdict of \$27,500 is excessive. As we have seen, as a result of the accident both plaintiff's legs were amputated a few inches below the knee. At the time of the injury plaintiff was 31 years of age, in robust health. He had a life expectancy according to the Carlisle table of over 33½ years. He had been raised on a cattle ranch in Wyoming and was engaged in raising stock in that state. He owned 160 acres of land and held two sections under a lease. He had a herd of some 75 horses and 100 cattle which grazed upon his own land and miles of uninclosed land in that vicinity. His evidence shows that the returns of his business netted him, annually, from \$400 to \$600 over and above what was required for the support of himself and family, and over and above the increase of his herds. He earned considerable breaking horses for cavalry use; his injury cut off that source of income. Many of the things he could do for himself in the conduct of his business he must now hire done. That he will sustain a direct pecuniary loss of at least \$1,000, annually, as a result of the accident is a reasonable inference from the evidence. At his age an annuity of \$1,000, payable quarterly, would cost \$18,876. In addition to this, he has paid out considerable sums and suffered other losses in consequence of the accident. Although the accident occurred some years ago, as a result he still suffers considerable bodily pain, which, according to his testimony, keeps him awake until he is worn out toward morning. The bodily pain he suffered, and still suffers, from the injury is a proper element of damage. There is no hard and fast rule for estimating the amount to be allowed for that element. The most that can be said is that the jury must be governed by reason and common sense. In *Swift & Co. v. Holoubek*, 62 Neb. 31, a boy between 14 and 15 years old recovered a judgment for \$11,500 for the loss of three fingers and part of a hand, leaving the thumb and index finger capable of some use.

This court reduced the judgment to \$7,500. In *Chicago, B. & Q. Co. v. Krayenbuhl*, 70 Neb. 766, an infant four years old recovered a judgment for the loss of a foot. This court, after ordering a remittitur, fixed his recovery at \$9,000. In *New Omaha T.-H. E. L. Co. v. Rombold*, 68 Neb. 54, this court held that a verdict of \$15,000 was not excessive for the loss of a foot in the case of a man earning \$65 a month, whose earning capacity was not thereby entirely destroyed. In the case of *Texas & N. O. R. Co. v. Kelly*, 30 Tex. Civ. App. 21, 80 S. W. 1073, a man 54 years of age, or 23 years older than Connolly, earning from \$1,200 to \$1,500 a year, was so injured that both his legs were paralyzed, and it was held that a recovery of \$30,000 was not excessive. In *Ehrman v. Brooklyn City R. Co.*, 14 N. Y. Supp. 336, a child 3½ years old suffered injury causing the amputation of one leg above the knee. It was held that a verdict for \$25,000 was not excessive. In *Illinois C. R. Co. v. Souders*, 79 Ill. App. 41, a woman 54 years old, who kept a boarding house, received a permanent injury to her arm and her lungs, but she did not lose either hand or foot. It was held that a recovery of \$20,000 was not excessive.

In *Kalfur v. Broadway F. & M. A. R. Co.*, 54 N. Y. Supp. 503, a child 18 months old lost one leg above the knee. It was held that a recovery of \$15,941.25, was not excessive. In *Chicago City R. Co. v. Wilcox*, 33 Ill. App. 450, a boy six years old lost one leg. It was held that a recovery of \$15,000 was not excessive. In *Roth v. Union Depot Co.*, 13 Wash. 525, a child nine years old lost one leg. Held, That a recovery of \$15,000 was not excessive. In *Western Union T. Co. v. Engler*, 75 Fed. 102, plaintiff suffered a compound fracture of his leg, causing the bone to protrude and denuding the periosteum. Many pieces of bone were taken out, and pieces continued to work out for 20 months afterwards. There was no amputation and amputation was not necessary, but it appeared that the plaintiff would probably be permanently lame. It was held that a recovery of \$15,000 was not excessive. In *Chicago, B.*

& *Q. R. Co. v. Dunn*, 106 Ill. App. 194, it was held that \$15,000 was not excessive for the loss of one leg. In *Howe v. Minneapolis, St. P. & S. S. M. R. Co.*, 62 Minn. 71, it was held that a verdict for \$14,500 was not excessive in the case of a young man permanently disabled, but who lost neither hand nor foot. In *Smith v. Metropolitan Street R. Co.*, 86 N. Y. Supp. 1087, it appeared that the plaintiff was injured in a collision between a street car and a vehicle. He was in the hospital about two months, but was unable to return to his regular business until about 10 months after the injury. It appeared that he would not likely fully recover from his injuries, but that he was not permanently disabled. It was held that a recovery of \$20,000 was proper. In *Alberti v. New York, L. E. & W. R. Co.*, 43 Hun (N. Y.), 421, a man 30 years of age was injured so that his legs were permanently crippled, but not lost. It was held that a verdict of \$25,000 was not excessive. In *Williamson v. Brooklyn Heights R. Co.*, 65 N. Y. Supp. 1054, it was held that a verdict of \$22,500 was not excessive in the case of a boy 11 years old who lost one leg. In *Stewart v. Long Island R. Co.*, 66 N. Y. Supp. 436, it was held that \$18,000 was not excessive in the case of a young man whose arm was permanently disabled and who suffered some nervous injury. In view of the actual pecuniary loss that must necessarily follow an injury of this kind to a man of plaintiff's age, business and situation in life, the physical pain and manifold inconveniences he has suffered and must continue to suffer, the recoveries upheld by this and other courts in similar cases, we cannot say that the damages awarded are excessive.

After a careful examination of the record, we are satisfied that it contains no reversible error, and recommend that the judgment of the district court be affirmed.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

DENNIS A. DRISCOLL, APPELLEE, V. MODERN BROTHERHOOD
OF AMERICA, APPELLANT.

FILED OCTOBER 4, 1906. No. 14,409.

1. **Waiver.** A waiver of a condition will not be implied from an act not inconsistent with an intention to insist upon performance.
2. ———. The acts relied upon as constituting a waiver must be those of the person whose rights are affected by it, or of some one duly authorized to act for him.
3. **Beneficial Association: CERTIFICATE, DELIVERY OF.** Where the constitution of a beneficial association requires the initiation of a member as a condition precedent to the delivery to him of a benefit certificate, the unauthorized delivery of such certificate to him by a subordinate officer before initiation will not operate as a waiver of such condition.
4. ———: **MEMBERSHIP: ESTOPPEL.** A secretary of a subordinate lodge by virtue of his authority to receive payment from members of their dues and assessments has no authority to receive such payments from nonmembers, and in case he does, and without the knowledge or consent of the association, or if his acts in that behalf are repudiated by it, it is not thereby estopped to deny that the persons thus making payment are members.
5. **An agent cannot ratify his own unauthorized acts.**

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Reversed.*

H. M. Sinclair, for appellant.

Thomas C. Patterson, contra.

ALBERT, C.

The plaintiff (appellee) brought this action against the defendant on a beneficiary certificate which purports to

have been issued to him by the defendant on the 30th day of April, 1904. The certificate on its face is, in effect, a life and accident insurance policy insuring the plaintiff's life in the sum of \$3,000, and indemnifying him in one-fourth that sum against certain bodily injuries resulting from accidental causes, the loss of an eye being included among such injuries. The defendant is a fraternal-beneficiary association organized and carried on for the sole benefit of its members and their beneficiaries, having a lodge system, with ritualistic work and a representative form of government, and, according to the stipulation of the parties, at the date of the certificate was doing business in this state under the provisions of section 91, ch. 43, Comp. St. 1905, relating to associations of that character. The constitution requires applications for membership to be accompanied by certain fees and to be voted upon by the subordinate lodge. If the vote be favorable to the applicant he shall then be examined by the local physician, and if recommended by him the application shall be forwarded to the head physician of the association. If the application be accepted by the head physician he shall forward it to the supreme secretary of the order, who shall forthwith issue a benefit certificate in such amount as the head physician shall authorize, not above a given amount, for the applicant, and transmit the same to the subordinate lodge through which the application was made. The constitution also provides that upon receipt of the certificate by the subordinate lodge the president thereof shall notify the applicant and he shall be initiated at a regular or special meeting, but that at any time before initiation the lodge may refuse to initiate him, in which case the certificate shall be returned to the supreme secretary with a certificate of the action of the subordinate lodge, and the initiation fee returned to the applicant. If the applicant fails to report for initiation within 60 days after his certificate has issued he forfeits his membership fee, and if he still desires to become a member must make another applica-

tion, in which case the fees paid on his first application are credited on the second. As soon as admitted to membership each member is required to deposit with the secretary of the subordinate lodge the amount of one benefit assessment, monthly *per capita* tax, the local dues for one month, and certain dues to the reserve fund. Thereafter he is required to pay certain assessments, monthly dues, and a *per capita* tax. The assessments, the *per capita* tax and a portion of the membership fee are to be remitted by the secretary of the subordinate lodge to the secretary of the supreme lodge. The constitutional requirements with respect to the terms and conditions upon which members may be received into the order, the initiation of candidates for membership, and the payments required upon admission to membership, are followed by these provisions:

"Sec. G. The liability of this fraternity for the payment of benefits upon the death or injury of a member shall not begin until all the acts, qualifications, and requirements prescribed for the applicant in the above division, and in all the laws, rules and regulations and ritual of the fraternity shall have been fully complied with by him, and until all acts therein prescribed for the lodge shall have been fully complied with by it, and until his application shall have been approved by the lodge and head physician, and a benefit certificate issued as provided in section C. of this division and delivered to applicant while in good health. And no officer of this fraternity is authorized or permitted to waive any of the provisions of this division or of these laws, or any other of the laws of this fraternity which shall relate to the contract of insurance between the members and the fraternity."

The plaintiff's application for membership was favorably acted upon by the subordinate lodge in this state and approved by the local physician, as well as by the head physician of the association, and his beneficiary certificate, bearing date of April 30, 1904, and duly signed by the proper officers, was forwarded by the supreme secre-

tary to the secretary of the subordinate lodge. The plaintiff had paid all membership fees required by him up to that time. On the morning of the 19th day of May, 1904, at plaintiff's solicitation the certificate was delivered to him by the secretary to whom he paid, at the same time, the initiation fee. A few days afterwards he paid the secretary the advance assessment and monthly dues which the constitution requires a member to pay upon his initiation. He subsequently paid the secretary the assessments and dues for June and July of the same year as they became due according to the laws of the association. He was not initiated as a member until July 17, 1904. The initiation fees were remitted to the supreme secretary August 27, 1904, who at once returned them to the local secretary with a letter denying that plaintiff had ever been a member and directing that the money be returned to him. On the evening of May 19, 1904, and after he had received his certificate, the plaintiff met with an accident which resulted in the loss of one of his eyes. His claim for indemnity was rejected by the association on the ground that liability on the certificate had not attached when the accident occurred. The defense interposed to the suit brought on the certificate was based on the same ground. A trial to the court without a jury resulted in a finding and judgment for the plaintiff. The defendant association appeals.

The constitution of the association, as well as the statute under which it is conceded it does business, restricts the benefits of the association to its members and their beneficiaries. It is a secret order and it is a matter of common knowledge that initiation is a condition precedent to membership in an order of that character. To speak of of an uninitiated member of a secret order would involve a contradiction of terms. The plaintiff appears to concede that membership in the order is a condition precedent to a recovery on his certificate and that the constitution contemplates that initiation shall precede mem-

bership, but insists that it was competent for the association to waive the requirement as to initiation, and that by the delivery of the certificate, the acceptance and retention of the fees, dues and assessments paid by him, it did waive such requirement and is now estopped to deny that he was a member in good standing when the accident occurred. So far as the membership fee paid by the plaintiff is concerned, the constitution, as we have seen, expressly provides that in case an applicant shall fail to report for initiation within 60 days after his certificate is issued he shall forfeit the membership fee, subject, however, to his right to have it credited on the membership fee for a second application. Consequently, the retention of this particular fee by the association is not inconsistent with an intention on its part to insist upon initiation as a condition precedent to liability on the certificate. A waiver of a condition will not be implied from an act not inconsistent with an intention to insist upon its performance. *Kilpatrick v. Kansas City & B. R. Co.*, 38 Neb. 620. Besides this money was not retained by the home office, but was returned, as we have seen, to the local secretary.

It remains, then, to inquire whether the delivery of the certificate to the plaintiff by the secretary of the subordinate lodge and the retention of the payment subsequently made by the plaintiff to such secretary amount to a waiver of the provision requiring initiation. One of the essential elements of a waiver is that the acts relied upon as constituting a waiver be those of the persons whose rights are to be affected by it, or of some one duly authorized to act for him. The association is a corporation and, consequently, can act only through its officers or agents. Such officers or agents may bind it while acting within the scope of their authority, but not beyond. The authority of each is defined and limited by the constitution of the association which is a part of the contract upon which the plaintiff seeks to recover. He is therefore chargeable with notice of such limitations and no question of ostensible authority arises. That the constitution of the association

contemplates that the certificate shall remain in the custody of the subordinate lodge, and not be delivered to the person upon whose application it was issued, clearly appears from the provision which authorizes such lodge to reject the applicant when he offers himself for initiation and requires it, in such case, to return the certificate to the supreme secretary. The duties of the secretary of a subordinate lodge as defined by the constitution are to receive payment of dues, assessments, etc., from members of his lodge, keep the records and perform such other acts as usually pertain to the office of secretary. He is not a general agent with authority to bind the association generally, but a special agent with authority to bind his principal while acting within the scope of his authority as defined by the constitution which, as before stated, is a part of plaintiff's contract. He has no authority to admit members to the order nor to waive any of the requirements for membership. He was a mere custodian of the certificate without authority to deliver it pending plaintiff's initiation. Plaintiff received the certificate with full knowledge of the secretary's lack of authority to deliver it at that time. The delivery of the certificate was not the act of the association or of any one authorized to act for it in that behalf, and therefore lacks an essential element of a waiver.

We come now to the acceptance and retention by the secretary of the subordinate lodge of the dues and assessments paid by plaintiff subsequent to the date of the delivery to him of the certificate. The record does not show that any of these payments were brought to the knowledge of the supreme lodge. It does show that two of them were brought to the notice of the supreme secretary who at once repudiated them on the ground that the plaintiff was not a member of the association. The reception of these payments stand, then, merely as the acts of the secretary of the subordinate lodge. He had authority to receive such payments from members of the association, and while acting within the scope of such authority could bind his

principal. But, having no authority to admit members into the association directly, there is nothing in the nature of his authority to receive payments from actual members. from which authority to confer membership by indirection, or to waive any of the constitutional requirements with respect thereto can be implied. The question of ratification does not arise, because the acts relied upon as a ratification, as well as those claimed to have become binding by such ratification, were the unauthorized acts of the same agent, and it is elementary that an agent cannot ratify his own unauthorized act. A different question might arise, were it shown that these payments had been accepted or retained with the knowledge or consent of the association. But such is not the case. The plaintiff's position, as disclosed by the record, is that of one who has knowingly dealt with an agent acting beyond the scope of his authority, and whose acts were repudiated by the principal as soon as they became known to him. Neither waiver nor estoppel against the principal can be predicated on that state of facts. The decision might be put on the ground that no waiver or estoppel is pleaded by the plaintiff, but, as the case must go back for a new trial, we thought best to discuss what appeared to us the more important features of the case.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

**BELLE S. B. HARVEY, APPELLANT, V. CORDELIA J. GODDING
ET AL., APPELLEES.**

FILED OCTOBER 4, 1906. No. 14,420.

1. **Judgment Lien: APPEAL.** An appeal by a judgment defendant to this court does not in the absence of a supersedeas, operate to prolong the life of the judgment lien.
2. ———: ———: **REMAND.** The provision of section 509 of the code, relative to a judgment lien dating from the filing of a special mandate from this court in the lower court, has exclusive reference to the special mandate required by section 594 thereof, in case this court, upon reversal of a judgment in whole or in part, renders such judgment as the lower court should have rendered, instead of remanding the cause with directions to the lower court to render such judgment.
3. **Execution Sale: DORMANT JUDGMENT.** A sale of real estate under an execution issued on a dormant judgment is void as to one who acquired title to the property from the judgment debtor during the life of the judgment lien. *Gillespie v. Switzer*, 43 Neb. 772, and *Link v. Connell*, 48 Neb. 574, modified.
4. **Attachment Lien: DORMANT JUDGMENT.** In an action aided by attachment, upon the entry of judgment the attachment lien is merged in that of the judgment, and thereafter the lien is a mere incident to the judgment and ceases to exist when the judgment becomes dormant.
5. **Fraudulent Conveyance: HUSBAND AND WIFE.** A gift from a husband to his wife executed when the former was solvent, and not made in contemplation of insolvency or of engaging in some hazardous enterprise, will be upheld, if not excessive, considering the husband's circumstances at the time the gift was made.
6. **Evidence examined, and held to establish the bona fides of a conveyance from a husband to his wife.**

APPEAL from the district court for Otoe county: PAUL JESSEN, JUDGE. *Reversed with directions.*

E. F. Warren, for appellant.

W. F. Moran and *W. A. Corson*, contra.

ALBERT, C.

The plaintiff, Belle S. B. Harvey, brought this suit to quiet the title to certain real estate in Otoe county. The controversy is between her and the defendant Cordelia J. Godding and we shall refer to them hereafter as plaintiff and defendant, respectively. The defendant Asa Godding is the husband of Cordelia J. Godding, and claims some interest by virtue of such relationship, but not otherwise. The defendant Mohrman is in possession of the property claiming as tenant of Mrs. Godding. Plaintiff's husband is the common source of title. The plaintiff claims under a deed executed and delivered to her by her husband on the first day of June, 1895, which was filed for record and recorded on the 17th day of December, 1897. The defendant bases her claim of title to the property upon the following state of facts: On the 14th day of December, 1892, the First National Bank of Omaha commenced an action aided by attachment against the plaintiff's husband. The writ was levied upon the property in question on the 19th day of December of the same year. On the 25th day of March, 1895, a judgment was rendered against the plaintiff's husband for a certain amount and an order entered directing a sale of the attached property. The judgment defendant prosecuted error to this court, without a supersedeas, where the judgment of the district court was affirmed on the 20th day of October, 1898. For some reason a mandate did not issue until the 5th day of January, 1900, when one issued commanding the district court "to cause execution to issue carrying into effect your (its) said judgment," and which was filed in the district court on the 2d day of April, 1900. The first writ issued to enforce the judgment was an order of sale issued on the 7th day of September, 1901, whereunder the property was sold. The sale was confirmed and a sheriff's deed executed to the purchaser on the 9th day of November of the same year. The purchaser at the sheriff's sale subsequently conveyed to the defendant. The district court dismissed the bill, and the plaintiff appeals.

The plaintiff contends that, because more than five years had intervened between the date of the judgment against her husband and the issuance of the order of sale thereon, the judgment was dormant and not a lien against the property when the order of sale issued, and, consequently, that the sale of the property under such order of sale was ineffective to divest her title. On the other hand, the defendant contends: (1) That the period during which a judgment remains alive and continues to be a lien upon the real estate of the judgment debtor is to be computed in this case from the second day of April, 1900, the date upon which the mandate from this court was filed in the district court commanding the district court to enforce the judgment against the plaintiff's husband, and, consequently, that the judgment was alive and a lien upon the property when the order of sale issued and the sale was made thereunder. (2) That, even if the judgment had become dormant, and had ceased to be a lien against the property at the time the order of sale issued, the sale and subsequent proceedings under said judgment are not void, but merely voidable, and cannot be assailed in a collateral proceeding.

The defendant's first contention is based on one of the provisions of section 509 of the code. That section, so far as is material at present, is as follows: "No judgment heretofore rendered, or which hereafter may be rendered, on which execution shall not have been taken out and levied before the expiration of five years next after its rendition, shall operate as a lien upon the estate of any debtor, to the preference of any other *bona fide* judgment creditor (or purchaser); but in all cases where judgment has been or may be rendered in the supreme court, and any special mandate awarded to the district court to carry the same into execution, the lien of the judgment creditor shall continue for five years after the first day of the next term of the district court to which mandate may be directed." The defendant insists that the mandate from this court on the judgment against plaintiff's husband

was a special mandate within the meaning of the foregoing section. Dictum may be found sustaining this position, but we do not think it is tenable. We think the special mandate referred to in that section is the special mandate required in section 594 of the code. That section is as follows: "When a judgment or final order shall be reversed either in whole or in part, in the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment; and the court reversing such judgment or final order shall not issue execution in causes that are removed before them on error, on which they pronounced judgment as aforesaid, but shall send a special mandate to the court below, as the case may require, to award execution thereupon; and it shall be the duty of the judges of the supreme court to prepare and file their opinion in every case as brought before them, within sixty days after the decision of the same, and no mandate shall be sent to the court below until the opinion provided for by this section has been filed. The court to which such special mandate is sent, shall proceed in such case in the same manner as if such judgment or final order had been rendered therein, and on motion and good cause shown, it may suspend any execution made returnable before it by order of the supreme court, in the same manner as if such execution had been issued from its own court, but such power shall not extend further than to stay proceedings until the matter can be further heard by the supreme court." The foregoing section deals with cases wherein this court has rendered a judgment of reversal. In such cases it is optional with this court either to proceed to render such judgment as the court below should have rendered or to remand the cause to the court below for such judgment. It provides that in case the former course is pursued and the proper judgment rendered in this court, this court may not issue execution on such judgment, but shall issue a special mandate to the court below to award execution

"thereupon." By the provision of section 509, therefore, in case this court should render "such judgment as the court below should have rendered," instead of remanding the cause for such judgment, the judgment rendered by this court would continue to be a lien on the property of the judgment defendant for five years from the date of filing the special mandate in the district court. The two sections should be read together, the one providing a means whereby judgments rendered in this court may become a lien upon the real estate of the debtor in the county from which the proceedings in error were prosecuted, the other as fixing the period during which the lien shall continue. Both sections refer to a "special mandate." The latter shows the sense in which the makers of the code used the term. There is nothing in the code to indicate that they used it in any other sense. It is clear to us that the special mandate referred to in section 509 is the special mandate required by section 594 to be issued to the lower court commanding it to execute a judgment rendered by this court upon the reversal of a judgment of such lower court in whole or in part, and has no application to a case like that of the plaintiff's husband, where the only judgment of this court was one affirming the judgment of the lower court and which called for no special mandate. As execution on the judgment against the plaintiff's husband was not stayed pending his appeal to this court, it would follow that the judgment became dormant and ceased to be a lien upon his property at the end of five years after its rendition and before the order of sale in question issued.

The defendant's second contention involves this question: Is a sale of real estate under an execution issued on a dormant judgment void, or merely voidable, as to a grantee of the judgment debtor who took title from the judgment debtor while the judgment was alive and a lien on the property? Three cases decided by this court are relied on as sustaining the proposition that a sale thus made is not void, but merely

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voidable. The first is *Gerecke v. Campbell*, 24 Neb. 306. That case, however, is not in point. There an execution had issued on a dormant judgment and had been levied on a crop of growing corn. The judgment debtor thereupon paid the judgment, and the levy was released. He afterwards brought suit against the justice who issued the execution, claiming that he had paid the judgment under duress. The question finally presented was whether the execution was void, or merely voidable, and this court held that it was voidable, but not void. It will be observed that there the execution was assailed by the judgment debtor himself. Here a sale of real estate under an execution issued on a dormant judgment is assailed by the plaintiff, who held title to the property as grantee of the judgment debtor when the execution issued and the sale thereunder was made. The distinction between the two cases is obvious. The second case relied on is *Gillespie v. Switzer*, 43 Neb. 772, and the third is *Link v. Connell*, 48 Neb. 574. In these cases the sales sought to be avoided were each made under a decree of foreclosure of a mortgage. In each case the sale was attacked by one claiming title by conveyance, mediate or immediate, from the mortgagor subsequent to the mortgage, and on the ground that more than five years had intervened between the date of the decree and the date of the issuance of the order for the sale of the property. Both cases might have been disposed of on the ground that the provisions of the code with respect to the time when a judgment becomes dormant and ceases to be a lien on the real estate of the judgment debtor have no application to a decree in equity for the sale of specific real estate, as was held in *Herbage v. Ferree*, 65 Neb. 451. But the court put both decisions on substantially the same ground, namely, that a sale of real estate to satisfy a judgment which has become dormant under the provisions of section 482 of the code is voidable only, and cannot be assailed in a collateral proceeding. There is ample authority for the foregoing rule, if limited to the judgment debtor.

But outside of the two cases cited we have been unable to find a single case where it has been applied to the judgment debtor's grantee who held title when the execution issued and the sale thereunder was made. The rule as thus extended is utterly irreconcilable with the doctrine that, when a judgment becomes dormant, its lien is lost as against a mortgage executed by the debtor and recorded during the life of the judgment lien (*Flagg v. Flagg*, 39 Neb. 229), and that, when a dormant judgment is revived, it is not a lien on real estate conveyed by the judgment debtor after the rendition of the judgment and before it had become dormant (*Halmes v. Dovey*, 64 Neb. 122). Even where execution issues during the life of the judgment lien, but the sale made thereunder takes place after the time fixed by statute for the termination of such lien, except in the state of Missouri, it has been uniformly held, both in this country and England, that the title acquired by such sale is precisely the same as though the judgment had never been regarded as a lien, and that such sale does not operate to divest a title acquired from the debtor during the life of the judgment lien. 2 Freeman, Executions (3d ed.), sec. 205; 2 Freeman, Judgments (4th ed.), sec. 394a. In *Tucker v. Shade*, 25 Ohio St. 355, the court said: "It is well settled that the title of a purchaser from the judgment debtor is, on the judgment becoming dormant, discharged from the lien, and that the subsequent revivor of the judgment will not affect such title." We are satisfied that the rule announced and applied in *Gillespie v. Switzer*, and in *Link v. Connell*, *supra*, is too broad, and that it should be modified and restricted so as not to apply to those whose rights in the property have been acquired from the debtor during the life of the judgment lien.

The fact that the action in which judgment was taken against plaintiff's husband was aided by attachment, and that the judgment contains an order for the sale of the attached property, would not continue the lien beyond the period fixed by statute nor bring the case within the

rule announced in *Herbage v. Ferrée, supra*. In that case the court was dealing with a decree in equity entered in a suit where the relief sought and obtained was the foreclosure of a mortgage lien. Here we are dealing with a judgment rendered in an action at law. When the judgment was rendered the attachment lien was merged in that of the judgment, differing from an ordinary judgment lien only in that it related back to the levy of the attachment. A judgment lien is a mere incident and cannot exist independently of the judgment. When the judgment becomes dormant the lien ceases to exist.

Another defense urged to the plaintiff's suit is that the conveyance of the property in question to her was made without consideration and in fraud of her husband's creditors, including the judgment creditor hereinbefore mentioned, and, for that reason, she cannot be heard to assail the validity of a sale made under an execution issued in favor of such judgment creditor. That the plaintiff's husband was insolvent when this conveyance was made is conclusively established. Consequently, the burden is upon the plaintiff to show that the conveyance was made in good faith. *National Bank of Commerce v. Chapman*, 50 Neb. 484. The evidence is uncontradicted that in 1882 the plaintiff's husband was worth more than \$2,000,000 over and above his debts. His business was prosperous and not attended by unusual hazards. At that time he made a gift to his wife, the plaintiff in this suit, of a large tract of land in this state. It is not claimed that this gift was made in contemplation of insolvency nor that it was excessive in view of the husband's financial condition and that a part of his wealth had come to him through her. The plaintiff held title to this tract of land until the spring of 1891. At that time her husband and one of the corporations with which he was connected had become involved in debt, and it was arranged between him and the plaintiff that she should sell the land and allow him to use the proceeds temporarily to discharge some of his indebtedness. The sale was made and the

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money loaned by the plaintiff to her husband. Her husband's affairs became more and more involved until 1893, when he was forced to mortgage his holdings to raise money and to satisfy his creditors. As he says in his testimony, the properties were put in groups, each covered by a mortgage. The property in suit then belonged to him, and, intending to execute a mortgage thereon to secure a note of \$1,200 to be turned over to the plaintiff to secure a part of his indebtedness, he executed a mortgage, describing the property as "lots 1 and 2 of block 15, in the town of Syracuse," etc., instead of lots 1 and 2 of block 15, Gray's Second Trustee's addition to the town of Syracuse, the true description. This note and mortgage were turned over to the plaintiff for the purpose stated. Her husband, unable to meet his obligations, conveyed the fee title to this property to the plaintiff by its true description on the 1st day of June, 1895, which is the conveyance under which she now claims. The evidence adduced by the plaintiff explanatory of the conveyance of the property to her is uncontradicted, and, while some discrepancies are shown, the explanation in the main appears reasonable and straightforward, and sufficient to overcome the presumption arising from the fact that the transaction was between husband and wife. That the money loaned by the plaintiff was derived from a sale of property which she had received as a gift from her husband is immaterial, because the gift was made when he was solvent and not contemplating insolvency, and was not excessive in view of his circumstances at the time. *Morse v. Raben*, 27 Neb. 145; *Jones v. Clifton*, 101 U. S. 225; *Sexton v. Wheaton*, 8 Wheat. (U. S.) 227. The plaintiff was one of her husband's creditors and he had a right to make a preference in her favor. *Clarke Drug Co. v. Boardman*, 50 Neb. 687; *National Bank of Commerce v. Chapman*, 50 Neb. 484.

In view of the evidence and the law governing this case, as we understand it, the plaintiff is entitled to the relief prayed. It is therefore recommended that the decree of the district court be reversed and the cause

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remanded, with directions to enter a decree in favor of the plaintiff.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded, with directions to enter a decree in favor of the plaintiff.

JUDGMENT ACCORDINGLY.

CHARLES S. FRYER, APPELLEE, v. WILLIAM I. FRYER, APPELLEE; COLUMBIA NATIONAL BANK ET AL., APPELLANTS.

FILED OCTOBER 4, 1906. No. 14,684.

1. **Deeds: VALIDITY.** Where a grantor places his deed on record for the purpose and with the intent of passing title to his grantee pursuant to a valid agreement between them, actual manual delivery and formal acceptance are not essential to the validity of the conveyance. Following *Issitt v. Dewey*, 47 Neb. 196.
2. Evidence examined, and held to bring the case within the foregoing rule and to sustain the findings of the trial court.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Wilson & Brown, A. J. Sawyer and N. Z. Snell, for appellants.

George A. Adams, contra.

ALBERT, C.

This is an appeal from a decree of foreclosure whereby the lien of plaintiff's mortgage is given priority over the respective judgment liens of the two banks, defendants herein. The mortgage is in the form of an absolute conveyance to the plaintiff by the defendant, William I.

Fryer, and his wife of certain real estate in the city of Lincoln, was signed and acknowledged by the grantors on the 22d day of April, 1901, and was filed for record on the 28th day of April, 1902, by William I. Fryer, who had retained it in his possession after it was signed and acknowledged, and after it was recorded, was forwarded to him at Denver, Colorado, where he had taken up his abode. Plaintiff resides in the state of Iowa. On the 18th day of December, 1902, each of the defendant banks brought an action against William I. Fryer, who was the fee owner, and caused a writ of attachment to issue which was levied on the premises covered by the mortgage. In each of these cases judgment was given in favor of the plaintiff therein and an order entered for the sale of the premises for the satisfaction of the judgment. In the present suit the contest is between the plaintiff and the two banks as to the priority of their respective liens, and is now narrowed down to the single question whether there had been a delivery of the mortgage to the plaintiff before the levy of attachments on the property. The two banks join in an appeal, and contend that, while the evidence shows the mortgage was signed, acknowledged and recorded some time before their attachments were levied, it is insufficient to sustain a finding that it was delivered to the plaintiff before that date.

Appellants' contention seems to be based on the fact that the plaintiff never saw the mortgage nor had actual manual possession of it until after this suit had been pending for some time, and long after the levy of the attachments. But the authorities are uniform that actual manual delivery is not essential to give effect to a deed. In *Issitt v. Dewey*, 47 Neb. 196, it was held that, where the grantor places his deed on record for the purpose and with the intent of passing title to the grantee, actual manual delivery and formal acceptance are not essential to the validity of the conveyance. In the case at bar the evidence is conclusive that at the date of the mortgage deed the mortgagor, William I. Fryer, was indebted to the

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plaintiff on two notes, aggregating \$5,000, for borrowed money, and that at the time such indebtedness was contracted it was agreed between the parties that William I. Fryer should convey the property in suit to the plaintiff as security for the debt, and file the conveyance for record. William I. Fryer testified on behalf of the plaintiff, and, while portions of his testimony would indicate that he had no clear recollection of what he did with the instrument after it was forwarded to him at Denver, toward the close of his testimony he testified positively that it had been forwarded to the plaintiff before the date of a certain payment made by him, which was made September 21, 1902, and almost three months before the attachments were levied. It was after learning of this testimony that plaintiff made search and found the instrument among his papers. His statement, received in evidence as a part of his testimony, accounting for his failure to discover it earlier, is to the effect that it must have been received by another member of his household and placed among his papers during his absence from home. The record further shows that at least two months before the attachments were levied William I. Fryer had importuned the plaintiff to reconvey a portion of the mortgaged premises to the latter's wife, and that plaintiff had refused to do so. The evidence, we think, is amply sufficient to show that the instrument was placed on record by William I. Fryer with the intent and for the purpose of passing the title to the plaintiff, and to render evidence of an actual manual delivery and formal acceptance unnecessary, under the rule announced in *Issitt v. Dewey*, *supra*.

The appellants further contend that, even if it be found that the mortgage deed had become effective previous to to the levy of their attachments, still they should have priority with respect to one of the lots included therein because of an alleged agreement between the plaintiff and William I. Fryer, whereby the former agreed, in consideration of the payment of a substantial portion of

the mortgage debt, to reconvey such lot and release it from the lien of the mortgage. There is no evidence tending, even remotely, to show such an agreement, save a bare claim to that effect put forward in a letter written by William I. Fryer to the plaintiff. And, even were such claim given the force of evidence tending to establish the agreement, there is an utter want of evidence to show that William I. Fryer had complied with the conditions upon which the reconveyance was made contingent, according to his own letter in which his claim thereto was put forth for the first and only time.

The decree of the district court seems amply sustained by the evidence, and we recommend its affirmation.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

THOMAS F. KECKLER, APPELLANT, v. MODERN BROTHERHOOD OF AMERICA, APPELLEE.

FILED OCTOBER 4, 1906. No. 14,440.

Directing Verdict. Where there is an entire failure of proof to sustain a material allegation of the plaintiff's petition put in issue by the answer, the action of the district court in directing a verdict for the defendant will be sustained.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

A. N. Sullivan, for appellant.

Byron Clark, contra.

JACKSON, C.

The defendant is a fraternal-beneficial association organized under the laws of Iowa with authority to transact

business in Nebraska. It issues certificates providing for indemnity in case of death, benefits for total disability occasioned by old age, and accident insurance. It is, by its charter, exempted from liability for accident to those of its members who, when received into the order, have a defective hand, arm, foot, leg or eye. On March 15, 1901, the plaintiff applied for membership through a local lodge in Cass county. The medical examination disclosed that his right eye was injured when he was an infant six years of age, causing a loss of sight in that eye. On April 8, following the application and examination, the supreme lodge issued its certificate containing provisions for payment of death loss and permanent disability benefits. Through that portion of the certificate providing for accident insurance had been drawn diagonally ten red ink lines. The certificate in this condition was delivered to the plaintiff, who on September 14, 1903, sustained an injury resulting in a broken leg. He claimed liability on the part of the association, which was denied; hence this action.

The petition, omitting the formal parts, is as follows: (1) "The plaintiff complains of the defendant, for that at the time hereinafter mentioned defendant was and now is a corporation duly organized with lawful authority to issue policies of life and accident insurance. (2) On or about the 8th day of April, 1901, said defendant, in consideration of the sum of \$15, made and delivered to plaintiff its policy of insurance in writing on the life of plaintiff and against accident, in the sum of \$100, if plaintiff should by accident receive a broken leg. (3) On or about the — day of September, 1903, and while said policy was in full force, said plaintiff received a personal injury, accidentally resulting in a broken leg, being an accident insured against by said policy of insurance. (4) The plaintiff duly performed all the conditions of said policy on his part to be performed. (5) Plaintiff has made due proof of said accident in conformity with the requirements of said policy. Said policy is hereto at-

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tached, marked Ex. A, and made a part of this petition. (6) No part of said insurance has been paid, and there is now due from defendant to plaintiff thereon the sum of \$100, together with interest thereon at 7 per cent. from October 1, 1903, on which sum plaintiff prays judgment, with costs of suit."

The answer put in issue the liability for accidents. At the close of the evidence the court directed a verdict for the defendant and entered judgment thereon. The plaintiff appeals.

As we view the case, the court took the only course justified by the evidence. It seems to be the contention of the plaintiff that the red lines in the contract are for ornamental purposes. This is hardly consistent with the fact. The purpose of these lines on the face of the certificate was clearly to eliminate the feature of accident insurance as provided by the fundamental law of the order. It is an ordinary method of reforming printed blanks to conform to actual contracts. The action being to recover on an express contract, the written instrument failed to sustain the plaintiff's cause of action, and we recommend that the judgment appealed from be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FIRST NATIONAL BANK OF PLATTSBURGH, APPELLEE, V.
ESTATE OF FREDERICK D. LEHNHOFF, APPELLANT.*

FILED OCTOBER 4, 1906. No. 14,444.

Contract: CONSIDERATION. The doing of that which the creditor of a corporation is required by law to do before he could maintain an action against the stockholders of the corporation is not a sufficient consideration to support a promise.

* Rehearing allowed. See opinion, p. 307, *post*.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Reversed.*

A. L. Tidd and Matthew Gering, for appellant.

Byron Clark, contra.

JACKSON, C.

The Plattsmouth Brick and Terra Cotta Manufacturing Company, a corporation doing business in Cass county, was insolvent. It was indebted to the First National Bank of Plattsmouth and the Bank of Cass County. The First National Bank contemplated an action against the stockholders of the manufacturing company for the purpose of recovering the amount of indebtedness of that company to the bank. Certain of the stockholders of the manufacturing company submitted to the creditor banks the following written proposition: "Plattsmouth, Neb., May 11, 1903. We, the undersigned stockholders, do each agree with each other and the First National Bank of Plattsmouth and the Bank of Cass County of Plattsmouth, or either of them accepting in writing hereon this proposition, that if they will refrain from suing us as stockholders of the Plattsmouth Brick & Terra Cotta Manufacturing Company until the assets of said corporation are exhausted in suits by each of them to be maintained upon their respective notes against the corporation, when the deficiency is ascertained, we will prorate among ourselves, based upon our holdings of stock in said corporation, such deficiency and pay it. J. G. Richey, W. J. White, F. D. Lehnhoff, A. Baxter Smith, D. Hawksworth, Fred Goos per Henry, T. H. Pollock, H. B. Burgess." The First National Bank accepted the proposition, and proceeded in an action at law in the district court for Cass county to recover judgment against the manufacturing company, upon which execution was issued and all of the assets of the company sold. In the meantime F. D. Lehnhoff, one of the stockholders whose name

appeared on the agreement with the bank, died, and his estate was in process of administration. The First National Bank filed its claim against Lehnhoff's estate for the proportionate share due the bank under the terms of the written agreement. From an order allowing the claim an appeal was taken to the district court, where a jury trial resulted in a verdict and judgment favorable to the bank. The executrix appeals.

It appears from the evidence that Lehnhoff's subscription to the capital stock of the manufacturing company was fully paid up, and that his name on the written agreement was in fact signed by his son, George Lehnhoff. It is urged on appeal that the written agreement was without consideration and for that reason unenforceable, and that George Lehnhoff was without authority to sign the written agreement on his father's behalf. The claim of want of consideration for the written agreement arises out of an application of section 4, art. XIb of the constitution. The provisions of that section are: "In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." It is said that the agreement to defer action against the stockholders until the remedy against the corporation had been exhausted is a contract to observe the mandatory provisions of the constitution; that no action on behalf of the bank could be maintained in any event against the stockholders until judgment had first been obtained against the corporation and the corporate property exhausted. The constitutional provision invoked on behalf of the estate has been several times construed by this court. In *Globe Publishing Co. v. State Bank*, 41 Neb. 175, an action against the stockholders of a corporation direct for a debt due from the corporation, where it was claimed the liability of the stockholders arose by reason of a failure to

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publish the annual notice provided by statute of its existing debts, it was held that the creditor had no right of action against the stockholders until it had reduced its claim against the corporation to judgment and until execution issued upon such judgment had been returned wholly or in part unsatisfied. In *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353, an action to enforce the special liability of a stockholder in a banking corporation under the provisions of section 7, art. Xib of the constitution, it was held that before the special liability could be enforced against individual stockholders the assets of the corporation must first be exhausted under the provisions of section 4 here being considered; while in *State v. German Savings Bank*, 50 Neb. 734, it was held that before the receiver of a banking corporation could enforce the liability for unpaid subscription of the capital stock the indebtedness of the bank must first be ascertained in a proper proceeding for that purpose.

It does not appear with any degree of certainty upon what theory the banks originally claimed liability of the stockholders of the manufacturing company for the debts of the company, but the inference is that they supposed the stockholders to be liable generally for the debts of the insolvent corporation and that they might maintain an action against the stockholders direct because of that liability. It does not seem to be important, however, in the determination of this case. Our decision, to be in harmony with the former holdings of this court, must be that the bank on its own behalf could not maintain an action against the stockholders without first exhausting its remedy against the corporation itself. The agreement on the part of the bank to do that which by law it was required to do before it could maintain an action against the stockholders was not a sufficient consideration to support the promise in its behalf. *Esterly Harvesting Machine Co. v. Pringle*, 41 Neb. 265.

It is urged by the appellee, however, that the contract is enforceable independently of the consideration already

discussed, because of its being a mutual promise between the stockholders with each other for the benefit of the bank. The rule thus invoked is applicable to subscription lists where a common object is to be obtained for the benefit of all. The case of *Armann v. Bucl*, 40 Neb. 803, does not support the contention of appellee. There the purpose of the subscription was to procure for a railroad corporation a tract of land for the erection thereon of a depot and switch grounds. The agreement was with the owner of the land, who conveyed the title to the railroad company, and the improvements contemplated were made. It is said in the body of the opinion: "A valuable consideration is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. Any damage, or suspension, or forbearance of a right, will be sufficient to sustain the promise." None of these elements are found in the contract in suit.

Again, it is urged that the contract provided for an extension of the time of payment of the debt of the company and that such extension affords a sufficient consideration, but that fact does not appear. On the contrary, the agreement clearly contemplated immediate action against the corporation.

We recommend that the judgment of the district court be reversed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

The following opinion on rehearing was filed June 7, 1907. *Judgment of reversal adhered to:*

1. Contract: CONSIDERATION. An agreement without benefit, advantage or detriment to either party is without consideration and not enforceable.

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2. Mutual promises, not for a common object or purpose and not mutually advantageous or detrimental, are without consideration and not enforceable.

AMES, C.

This case has been submitted upon reargument from a former decision pursuant to an opinion by Mr. Commissioner JACKSON, *ante*, p. 303. No new or additional propositions of law are urged, and the recital of facts contained in the former opinion is accepted by counsel as sufficiently complete and accurate, so that a restatement of them is at present uncalled for. The principal contention is that this court erred in holding that the agreement copied in a former opinion lacks a consideration requisite to render it obligatory as a contract. Counsel urges that an adequate consideration is furnished by an obligation assumed by the plaintiff to exhaust by suits the corporate assets of the brick company for the satisfaction of the claim of the former. But we do not find a promise, expressed or implied, to that effect in the agreement. The promise, although by its terms requiring acceptance by the plaintiff and, in fact, expressly accepted by it, is, notwithstanding, wholly unilateral by the subscribing stockholders. The document would not have been changed in legal effect if it had been made to read: "Although the First National Bank and the Cass County Bank, which are creditors of the Plattsmouth Brick and Terra Cotta Manufacturing Company, have and can acquire, by reason of that fact, no legal claim against us or any of us, who are stockholders of that company, yet, if said banks, or either of them, shall see fit to pursue their or its legal remedies against the company to the exhaustion of its assets, we will contribute proportionally to our holdings of stock to the payment of so much of such indebtedness as shall not be satisfied by the means aforesaid."

It is obvious that, tested by the rule announced by this court in *Armann v. Buel*, 40 Neb. 803, a promise in that form, or substantially to that effect, can have no legal

force. It is left, as it was, before the agreement was made, a matter of choice to the creditor whether it will pursue the course suggested, and a matter of indifference, as respects stockholders' liability, whether it does so or not. The creditor promises no suspension or forbearance of any legal right or remedy which it has, or is capable of acquiring, against either the corporation or its stockholders, or any of them, and as a corollary the subscribers to the agreement obtained no benefit or advantage by their promise.

The second proposition urged by counsel, and also discussed and decided in the former opinion, that the agreement is enforceable as expressing mutual promises by the subscribers to contribute toward the attainment of a common object, seems to us to be ill founded, for the reason that it is apparent, as well from the nature of the transaction as from the language of the instrument, that the object that the subscribers had in view was to make provision for the satisfaction of supposed legal obligations against them severally which, in fact, did not exist. The object was not to accomplish a mutual and common purpose, but to be discharged from supposed separate and several personal liabilities of each. If such liabilities had existed, the stockholders' obligation as such would have continued unaffected, and could have been enforced, and could have been satisfied, in exactly the same way and for precisely the same amount in the presence as in the absence of the agreement, and against such liability the agreement would have provided no indemnity, so that the essential element of mutuality is wholly lacking.

We recommend, therefore, that the former decision of this court be adhered to.

JACKSON and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former decision of this court is adhered to.

REVERSED.

MARY A. TOPPING, APPELLANT, V. JACOB COHN, APPELLEE.

FILED OCTOBER 4, 1906. No. 14,549.

Second Appeal: LAW OF CASE. Points necessarily determined by this court upon appeal become the law of the case and will not ordinarily be departed from in the further course of litigation. *Chicago, B. & Q. R. Co. v. Yost*, 61 Neb. 530.

APPEAL from the district court for Otoe county: PAUL JESSEN, JUDGE. *Affirmed.*

John C. Watson, for appellant.

W. F. Moran and *A. P. Moran*, *contra*.

JACKSON, C.

A judgment favorable to the plaintiff was reversed by a former opinion of this court, in which the case is fully stated. *Topping v. Cohn*, 71 Neb. 559. Amended pleadings were filed in the district court presenting substantially the same issues, excepting a plea of former adjudication in the answer. A second trial resulted in a judgment for the defendant, and the plaintiff appeals.

The evidence taken at the former trial, with additional evidence affecting only the question of adverse possession, is the basis of the present judgment. We are asked to review our former opinion, but find no satisfactory reason for doing so. No facts were adduced from the additional testimony tending to strengthen the plaintiff's case or change the conclusions formerly reached, and adhering to the established rule that points necessarily determined by this court upon appeal become the law of the case and will not ordinarily be departed from in the further course of litigation, we recommend that the judgment be affirmed.

DUFFIE, C., concurs.

ALBERT, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CENTRAL GRANARIES COMPANY, APPELLANT, v. LANCASTER
COUNTY, APPELLEE.*

FILED OCTOBER 18, 1906. No. 14,314.

1. **Taxation: ASSESSMENT.** Section 66, ch. 73, laws 1903, provides that grain brokers shall be assessed on the average amount of capital invested in the business for the preceding year, instead of on the amount of grain on hand on the first day of April.
2. **Double Taxation.** Taxing a grain company on its real estate and other tangible property, on the amount of its average capital, and also on the grain contained in its elevators on the first day of April, is, to the extent of the grain so assessed, double taxation, from which, in a proper proceeding, the courts will grant relief.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed.*

Hall, Woods & Pound, for appellant.

F. M. Tyrrell, J. L. Caldwell and C. E. Matson, contra.

BARNES, J.

The appellant is a corporation organized and existing under the laws of this state. Its main office is in Lincoln, Lancaster county, Nebraska. It owns and operates about 50 elevators, mostly in this state, and its business is that of buying, cleaning, selling and shipping grain to the various markets of the world. It owns and operates elevators at some 40 different towns, situated in several different counties throughout the state. It also owns elevators at Lincoln, Rulo and Holdrege, called cleaning elevators. The manner of conducting its business is such that in handling, disposing of and shipping its grain to market it all passes through the cleaning elevators at Lincoln, Rulo or Holdrege. It buys no grain at its Lincoln cleaning elevator, and the grain that goes through this elevator comes from some of its outside elevators, situated

See opinions on rehearing, pp. 319, 327, *post*.

 Central Granaries Co. v. Lancaster County.

in other counties in different parts of the state, where it is originally purchased. In 1904 appellant made its return under oath to the assessor of Lancaster county of its property subject to taxation in that county, which return was in substance as follows:

Capital stock	\$350,000
Surplus and profits	70,000
<hr/>	
Total valuation of stock.....	\$420,000
Property assessable in Lancaster county (itemized)	\$83,265
Property outside of Lancaster county otherwise assessed.....	336,735
<hr/>	
Total valuation of stock.....	\$420,000

The assessor of Lancaster county raised the amount of the property scheduled as assessable in that county \$10,000 to cover the grain in appellant's elevator in the city of Lincoln. Objections thereto were filed with the board of equalization. A hearing was had, the objections were overruled, and the case was appealed to the district court, where a trial resulted in the dismissal of the appeal, an affirmance of the order of the board of equalization, and an appeal therefrom was taken to this court.

The bill of exceptions establishes the following uncontroverted facts: First. The appellant's capital stock and surplus was \$420,000, which represented all of its property. \$83,265 worth of that property was situated and taxable in Lancaster county. The remainder of it, to wit, \$336,735 worth, was not used in Lancaster county, but was located and used in other counties. Second. The appellant's Lincoln elevator is a transfer and cleaning house, and no grain goes into that elevator except grain in transit, on its way from the company's elevators situated in other counties. Third. That the item in controversy, to wit, \$10,000 worth of grain in appellant's Lincoln elevator, was grain in transit. It is claimed by appellant that this grain in transit was purchased by, or represented a part of,

the \$336,735 of capital located and used in counties other than Lancaster, and had theretofore been assessed in said counties. It is contended by the appellee that the testimony does not sustain the foregoing claim.

We find that F. D. Levering, appellant's assistant treasurer, testified in substance that the capital stock and surplus of the company in 1904 was \$420,000; that his company owned and was then operating from 45 to 52 elevators in Nebraska and Kansas, 8 or 9 in Kansas and the remainder in Nebraska; that the only elevator the company had in Lancaster county, outside of Lincoln, was at Waverly; that the only place the company buys grain in Lancaster county is Waverly; that it was not using any of its capital in buying grain in Lincoln; that the company bought no grain in Lincoln; that all of the capital of the company other than the amount invested in permanent improvements was used in buying grain at points outside of the city of Lincoln; that all of its capital, except the listed items reported and assessed in Lancaster county, to wit, \$336,735, was invested in grain elevators and grain outside of Lancaster county; that all of this portion of the company's capital was located and was being used by the company in other counties than Lancaster; that it was invested in elevators, cribs, scales, gas engines and grain.

E. J. Herring, who was in the employ of the appellant company, and who has especial charge of the assessment of its property in this state and Kansas, testified as follows: "Q. At the company's outlying elevators in other counties than Lancaster county, do you know what method the assessors of the various counties adopted in arriving at the amount of capital stock the Central Granaries Company was using at these elevators located in these various counties? A. Yes, sir. Q. State to the court whether or not the assessors where these various elevators were located arrived at the amount of capital that you had invested at that particular point by taking into consideration the whole year's business, or volume

of business for the year, in getting at the amount, the average amount of capital invested to the first day of April? A. Yes, sir. Q. And for those computations do you furnish the books to the assessors at these various places? A. Yes, sir; we did. Q. And did they take into consideration, in arriving at the amount of capital that you had invested there, all of the grain purchased during the year, from April 1, 1903, to April 1, 1904? A. Yes, sir."

On cross-examination the witness further stated: "A. They took the average capital, the corn cribs, the elevator, the gas engine, and the bank account, and the horse power, and any other tangible property we had. Q. And added it to the average capital or subtracted it? A. Added it to the average capital. Q. Did they add the real estate? A. We have no real estate. Elevators are personal property. Q. They added the personal property to the average capital? A. Yes, sir. Q. And the cash on hand? A. Yes, sir. Q. And the grain on hand? A. No, sir; I did not say that. Q. That is a part of your tangible property, is it not? A. No, sir; that is figured in this average capital."

The only evidence introduced by the appellee was the testimony of the county assessor, the instructions of the state board to county assessors, and the instructions of the Lancaster county assessor to his deputies. None of this testimony in any way controverts the evidence above quoted. From the foregoing, we are of opinion that the evidence is sufficient to show, *prima facie*, that appellant was assessed in the various counties where it was engaged in business (outside of Lancaster county) to the amount of \$336,375 as average capital employed in its business in said counties.

The appellant contends that the action of the taxing officers of Lancaster county in adding \$10,000 to its schedule for grain in its Lincoln elevator subjects it to double taxation to that extent, and the district court erred in refusing to grant it the relief prayed for by its

petition. If its property in other counties had theretofore been assessed for taxation in the manner provided by law, then its contention is well founded.

That appellant is a grain broker, within the meaning of section 66, ch. 73, Laws 1903, commonly called the "New Revenue Law," and should be assessed in the manner therein pointed out, is beyond question. That section reads as follows: "Every person, company or corporation engaged in the business of buying and selling grain for profit, shall be held to be a grain broker, and shall, at the time required by this act, determine under oath the average amount of capital invested in such business, exclusive of real estate or other tangible property, assessed separately, for the preceding year, and taxes shall be charged upon such average capital the same as on other property. For the purpose of determining the average capital of such grain broker the county assessor or deputy assessor shall have the right to inspect all books of account and the checkbooks of such grain broker and shall determine and fix the amount of such capital by such inspection." As we have already seen, the appellant, before it returned its schedule to the assessor of Lancaster county, listed \$336,375 of its average capital in other counties. And this brings us to the consideration of what is meant by, or included in, the words "average capital" as used in the section of the revenue law above quoted. It would seem that the legislature recognized the difficulty which would arise in attempting to assess grain brokers on the amount of grain on hand on the first day of April. If that method of assessment should be adopted, then it is safe to say that grain dealers would have no grain on hand at that time. If the plan of assessing the capital stock of corporations dealing in grain, wherever such company or corporation is located, should be adopted, we might find all of such capital was invested in grain, stored in various elevators throughout the state, which would have to be assessed where located and this would result in

double taxation. So, in order to adopt a method which should be fair to the broker, and at the same time tax the whole of his property, the legislature, by the section in question, provided for taxing the average capital used in the business for the previous year, wherever such business was conducted. In order to properly carry out that plan, it further provided that the broker should furnish his checkbooks and all his books of account to the assessor, who is required to determine "by inspection" the amount of such average capital. The law does not, in terms, provide for the taxation of both the average capital used by the broker in his grain business and the grain purchased therewith, and such could not have been the intention of the legislature. The average capital used in the business evidently means the money used in buying grain, and all of the money so used. By taxing this average capital, it makes no difference what amount of grain is on hand on the first day of April of each year. On that day it may have all been sold, and yet, by taxing the average capital in the place of the grain, the broker would be required to contribute his just proportion to the public revenue. The average capital today may be represented by money, while tomorrow it may be invested in grain purchased and on hand. Again, on the next day the grain may be sold, and the proceeds thereof will then constitute a part, or perhaps the whole, of the broker's average capital. Again, it would seem that the legislature has made a clear distinction between that part of the broker's capital used in the business, that is to say, in buying, selling, shipping and handling grain, and that part of it invested in other tangible property convenient and necessary for the purpose of conducting such business. We take it that by the words "average capital" is meant so much of the whole capital of the grain broker as is used in handling grain, and not that portion which is invested in tangible property for the purpose of successfully conducting the grain business. In construing a statute the court should, if

possible, give a reasonable meaning to all of its words and phrases. All tangible property must be taxed as such, unless otherwise provided by law. The law in question clearly implies that all of the tangible property of the grain broker, except grain purchased and sold, must be taxed as such. And to hold that the grain which he may happen to have on hand must be taxed, in addition to the average capital used in its purchase, would render the words "other tangible property assessed separately" meaningless. That grain is tangible property no one will dispute. But it seems clear that it was intended by the legislature that it should not be embraced in the words above quoted. So, we are of opinion that the average capital required to be listed by the grain broker was intended by the legislature to cover and stand in the place of all grain purchased and sold by him. To assess such grain, in addition to the assessment of his average capital, as above defined, amounts in fact to double taxation, which no one will contend is permissible.

It is contended by the appellee that the rule that a taxpayer who appeals to the district court from the action of the board of equalization in matters of assessment has the burden to show that the decision of the board is erroneous, requires us to affirm the judgment of the district court. It is a sufficient answer to this contention to say that the evidence contained in the record establishes *prima facie*, at least, the contention of the appellant; and where there is no dispute as to the facts, and the record shows forth the action of the board, together with the evidence on which such action is based, the matter then becomes a question of law to be determined by the reviewing court, and not one of fact. In such a case the presumption invoked has no application. It appears from the record that the reason given by the assessor for adding the \$10,000 in question to the appellant's schedule was that he was not satisfied that the appellant's average capital had been properly assessed in other counties throughout the state. Neither the

assessor nor the board of equalization of Lancaster county has any power or jurisdiction to review the action of the assessors and boards of equalization in other counties, and when it was shown by the appellant's evidence that it had listed its average capital in such outside counties, and it was there assessed, that fact raised the presumption that the taxing officers of such counties had correctly performed their duty.

Lastly it is contended by the appellee that the tax on the average capital of grain brokers, provided for by the section in question, is a tax on the business, or, in other words, a business tax, and is not a property tax within the meaning of the constitution; that, in addition to such business tax, it was proper, and it had the right, to tax the grain in question. That the legislature has the power to provide for taxing the business of grain brokers is beyond question. But that it has not done so seems clear. A business tax is defined to be a tax on the privilege of carrying on a business or employment, and is commonly imposed in the form of an excise tax on the license to pursue the employment. It is usually a specific sum, or a sum whose amount is regulated by the business done, or the income or profits earned. Such, for instance, as 2 per cent. on the gross premiums of an insurance company, or any given per cent. on the volume of the particular business conducted. The statute in question, however, makes no such provision. On the contrary, it states in plain terms that "taxes shall be charged upon such average capital the same as on other property." The average capital is thus treated as property, and the amount of the tax levied thereon depends upon the rate of taxation for all state, county and municipal purposes, the same as though levied on real estate, or other tangible property.

We are therefore of opinion that the district court erred in dismissing the appeal herein, and that the appellant is entitled to the relief sought.

For the foregoing reasons, the judgment of the district

court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

LETTON, J., dissents.

The following opinion on rehearing was filed July 12, 1907. *Former judgment of reversal vacated and judgment of district court affirmed:*

1. **Taxation: CLASSIFICATION: CONSTITUTIONAL LAW.** The classification (laws 1903, ch. 73, sec. 66) of "every person, company or corporation engaged in the business of buying and selling grain for profit" as a "grain broker," for purposes of assessment, and providing for the assessment of the average capital of grain brokers, is not unconstitutional.
2. ———: **ASSESSMENT.** The amount of capital invested in a business ordinarily is the whole amount of money invested and used in carrying on that business. The average capital of a grain dealer is defined by section 66 of the revenue law to be the average amount which the total investment in the business of the grain dealer exceeds the tangible property which can be separately assessed at the time of assessment. The assessor, from the examination pointed out in the statute, must find what capital of the business there was, if any, from time to time during the tax year, not including in the computation the tangible property on hand and capable of assessment at the time of assessing, and the average or mean of the capital so found is to be assessed as property in addition to the tangible property.

SEDGWICK, C. J.

The facts in this case, so far as the essential questions of law involved are concerned, may be found in the former opinion, *ante*, p. 311. A rehearing was granted, new briefs have been filed, and oral argument heard thereon. The plaintiff is a corporation engaged in buying and selling grain. It operates a large number of grain elevators located in different counties of the state. Among them it operates an elevator in Lancaster county for the transfer and cleaning of grain in transit to eastern markets. It returned to the assessor of Lancaster county for taxation a statement of its capital stock, its surplus

and profits, and an itemized statement of its tangible property assessable in Lancaster county. In this statement was not included \$10,000 worth of grain in its Lincoln elevator. The assessor added this property to the schedule, and whether he erred in so doing is the question to be decided. Section 66, ch. 73, laws 1903, is quoted in the former opinion. Several of the provisions of this section have been debated in this case.

1. The section of the statute under consideration provides that "every person, company or corporation engaged in the business of buying and selling grain for profit, shall be held to be a grain broker," and it is largely from this provision that attorneys for defendant draw their argument that the taxation imposed by this section on average capital is an occupation tax. Section 1, art. IX of the constitution, authorizes the legislature to tax peddlers, auctioneers, brokers, and others named, "in such manner as the legislature shall direct." It is, however, not to be supposed that the purpose of the legislature in providing that a dealer in grain "shall be held to be a grain broker" was to enable it to levy an occupation tax upon grain dealers, and so evade the above provision of the constitution. To determine what class of persons may be included in the term broker for the purpose of levying an occupation tax, it would be necessary to ascertain the true definition of the word broker as that term was generally understood at the time of the adoption of the constitution. The legislature could not enlarge its power to levy an occupation tax by extending the meaning of the words employed in the constitution beyond their reasonable and generally accepted significance when adopted. A different purpose is apparent in adopting a specified term to be applied to dealers in grain. The fact that the words "grain broker" are used instead of some other words is of no significance. By this section the legislature provides a manner to ascertain the value of the property of "persons, companies or corporations engaged in the buying and selling

of grain for profit," in some respects different from that employed in general. They are classed as grain brokers and are to be assessed upon their average capital. If the legislature has power to "require the assessment of average capital" instead of the assessment of the property owned at some specified time, and if there is a special and sufficient reason for using this method in assessing those engaged in buying and selling grain for profit, a reason that does not apply to assessment in general, then there can be no doubt of the power of the legislature to so classify such interests for assessment. *Rosenbloom v. State*, 64 Neb. 342. Some reasons are stated in the former opinion for assessing average capital invested in dealing in grain. In addition to what is there said, we quote the following very apt suggestions from the plaintiff's brief: "But the capital invested in the business is continually changing form from money to grain and then back to money. Hence, if taxed as grain, at a time when the grain on hand had all or for the most part been sold, but a fraction would be reached; if taxed as money, when a large amount of grain was on hand, but a fraction would be reached; if assessed both as grain and as money, the one being a mere form of the other, the same capital would be taxed twice; if assessed by taking the sum of the grain and the money on hand April 1, the danger would be that money is easily juggled and concealed. If an arbitrary date were taken, there would be a likelihood that grain brokers would have very little grain on hand and very little money on deposit on that day." It is, however, contended in the defendant's brief that the assessment of average capital is not the assessment of property within the meaning of the constitution, and therefore it is beyond the power of the legislature to provide for assessment in that manner, except as an occupation tax. This argument is not convincing. It will be conceded that the legislature might require the property owned by the taxpayer on the 1st day of May, or on any other specified day of the year, to

be valued for taxation, as well as to select the 1st day of April for that purpose. The requirement of the constitution is that the value of the taxpayer's property for assessment shall be "ascertained in such manner as the legislature shall direct." Property necessarily fluctuates in value, and ownership is changed from one person to another, so that if the average value during the year could be accurately ascertained it would furnish the true basis for taxation. Taking the value of each individual on some given day of the year is supposed to be, in ordinary cases, the most practicable method of reaching a just equalization of property for assessment.

2. A very important question in this case, and one that has been very much debated, is what is meant by average capital as used in the statute referred to. In our former opinion it was said: "Average capital used in the business evidently means the money used in buying grain, and all of the money so used." It is also considered in that opinion that grain in elevators is a part of the average capital of the business, and, being assessed as a part of such average capital, it cannot be separately specifically assessed. This led us to the conclusion that the assessor erred in placing the grain in plaintiff's elevator in Lincoln upon the schedule for assessment. The average capital of the business is generally understood to mean all of the money invested in the business and would include all property used in the business.

There is in New York a general statute which provides that nonresidents of the state doing business therein shall be taxed on the capital invested in such business as personal property. It was held that by the words "capital invested in such business" was meant the money which was put into the business with the intention that it shall be used in the transaction of the business. *People v. Feitner*, 67 N. Y. Supp. 893. This is the ordinary use of the word capital. Does the use of these words in this section of the statute and the connection in which they are used require us to infer a different meaning? It is

said that the words "other tangible property" used in connection with the words "real estate" in specifying what shall not be included in the average capital must be construed to mean other *like* tangible property, that is, other tangible property of the character of real estate. It is suggested that the connection in which these words are used and the subject matter of the section indicate this intention of the legislature. The constitution requires that all property of every nature be in some manner valued for taxation, and be required to bear its share of the public burden. The construction thus contended for does not seem to be more usual and natural than to consider the words used as equivalent to "all tangible property including real estate." If, in ascertaining the average capital for assessment as such, we include all tangible property that is capable of being assessed separately, including real estate, and deduct the value of all property already separately assessed, the object of the legislature would seem to be reached. This is analogous to the manner prescribed for assessing banks. The value of the capital stock of a bank for assessment is ascertained by taking the sum of its liabilities from the sum of its assets, and from this valuation of the stock, when so ascertained, is deducted for assessment the value of the tangible property that is otherwise assessed which enters into the valuation placed upon the assets. This, of course, gives the same valuation of capital stock for assessment as would be obtained by excluding all tangible property otherwise assessed in computing the assets of the bank, and we see no reason for giving any other construction to the section of the statute under consideration. This construction of the statute requires that the tangible property of a grain broker, including real estate, be assessed in precisely the same manner as the property employed in other ways is assessed.

A similar idea is found in the statutes of the state of Louisiana. Their revenue act contains the following declaration: "In assessing mercantile firms the true intent

and purpose of this act shall be held to mean, the placing of such value upon the stock in trade, all cash, whether borrowed or not, money at interest, open accounts, credits, etc., as will represent in their aggregate a fair average on the capital, both cash and credit, employed in the business of the party or parties to be assessed." The supreme court of that state had occasion to construe that statute in *Swift & Co. v. Board of Assessors*, 115 La. 322, 38 So. 1006. The court also discussed the meaning of the words "a fair average on the capital employed in the business." A definition of average is quoted from the Standard Dictionary: Average is "obtained by calculating the mean of several amounts, numbers, or quantities." The plaintiff in that case was engaged "in buying and selling of fresh meat shipped to the city of New Orleans in carload lots." The question involved was as to the proper method of ascertaining the fair average capital employed in the business. In the statement of the case by the court the following language occurs:

"In assessing the merchandise or stock in trade, the taxing authorities took the total amount of meat received during the previous year, and divided the same by 12, thus reaching what is called the 'average' value of stock on hand during the previous year." In regard to this method of obtaining the average value, the court said: "The assessors' contention is that the monthly receipts of merchandise during the year should be added together, and their sum total divided by 12. This method necessarily counts merchandise sold during the month as a part of the stock on hand at the end of each month, and is an assessment of the amount of purchases, rather than of stock on hand. As the money or credits received from sales are also taxable, this method would lead to double taxation, in contravention of the express provisions of section 7, which declares that no property shall be taxed twice in the same year.' Under the assessors' rule, a merchant whose entire capital is \$5,000 might be taxed on \$10,000 on stock in trade, if he each month sold \$5,000

of merchandise, and reinvested the proceeds in other merchandise. On the same theory a butcher or other vendor of perishable commodities, who buys and sells from day to day \$100 worth of stock, might be taxed on \$3,000 of capital. The circumstance that the merchant or dealer turns over his capital every six months, or every month, or every day does not affect the question. His capital, plus profits or minus loss, remains the same; and it is this average capital, represented by merchandise, money, rights, credits, which the statute intends to reach."

The court said that their statute does not provide "that the capital *eo nomine* shall be assessed, but that all the elements which enter therein shall be so valued as to represent a fair average of the capital employed." The same may be said of our statute, if we look to its intention and results. While our statute names "average capital," and declares that "taxes shall be charged" thereon, and so, when taken literally, requires average capital to be assessed in that name as an element of property, still the result and the manifest intention of the statute is to enable the assessing authorities to ascertain the proper assessable value of all the property used in the business. We may then say with the Louisiana court: "The meaning of the proviso, therefore, is that the average amount of stock, money, rights, credits, etc. (including real estate), which may vary through the year, shall be taken as the basis of assessment." That is, all property, real and personal, used in the business is to be assessed, and if the assessor, from the examination of the books, etc., which the statute requires him to make, finds that the property so assessed is less than the property (including money on hand or in bank, and real estate) in use in the business at other times during the preceding tax year, he ascertains from the books of account and checkbooks of the grain broker how much more property has been in use in the business at other times during the year than is so used at the time of the assessment. For instance, if he finds no grain, or but a small quantity, on

hand at the time of the assessment, and that at other times during the year there have been large quantities of grain on hand, and that all other elements of the net assets of the business have remained substantially constant, he should ascertain from the accounts, etc., how much this excess of grain on hand has been from time to time, and the average or mean of this excess (in the statute denominated "average capital invested") should be added to the assessment of the visible and tangible property. The true average capital would be the average sum invested in the business from time to time. The statute, however, points out the way to find what part of the true average capital has not been reached by the assessment of the tangible property found at the time of assessment, and requires the assessment to be corrected by adding this excess. If this is the true interpretation of the statute, then the assessor should value for taxation all of the property of the person, company or corporation engaged in the buying and selling of grain for profit, including real estate and grain on hand, and should then ascertain, in the manner that the statute points out, whether the average capital invested in the business during the preceding tax year was greater than the capital which he has so assessed, and, if he finds that it was greater, then he should add to his assessment such excess of the average capital invested. In this case the plaintiff omitted from its statement of property for taxation the amount of its grain on hand, and the assessor properly added this amount to the assessment. By its judgment the district court approved of this action on the part of the assessor and was right in so doing.

The judgment heretofore entered in this case is vacated and the judgment of the district court affirmed.

JUDGMENT ACCORDINGLY.

BARNES, J.

For the reasons given in our former opinion, I dissent from the foregoing conclusions.

The following opinion on motion for rehearing was filed October 16, 1907. *Rehearing denied:*

1. **Taxation: AVERAGE CAPITAL.** The average capital of grain dealers, mentioned in section 66 of the revenue law (laws 1903, ch. 73), is not the average of the total capital used in the business, but is the excess of such capital over the real estate and other tangible property which can be viewed by the assessor and "assessed separately."
2. **Average capital** is not average purchases, nor average sales, and cannot be found by adding together the amount of purchases or the amount of sales during the year, and dividing the sum by an arbitrary divisor.
3. **Average capital** is the average of the amount of cash and all other property of every kind used in carrying on the business; and, if there is an excess of this average of capital over the amount of real estate and other tangible property that can be viewed by the assessor, then such excess is to be added for assessment.

SEDGWICK, C. J.

The appellant has filed in this case a brief in support of a motion for a rehearing. From this brief it appears that the opinion herein is not at all understood by counsel for appellant. Speaking of the opinion the brief says: "It is vague, hazy, indefinite, and muddy as it can be, and I speak respectfully. It furnishes no definite rule or guide that can be followed either by the assessor or the grain broker." The case is one of very much importance. The opinion is supposed to be a guide for assessors in all parts of the state in assessing grain dealers. If the court has failed to so state its views as to enable the learned and able counsel for appellant to understand them, it would seem to be desirable to attempt to make the opinion clearer, so that assessors, who are not supposed always to possess the legal acumen of appellant's counsel may be able to understand the construction which the court attempts to give to this statute. Counsel understand that the average capital of a grain dealer is to be found by adding together all the purchases

of grain during the year and dividing the total amount by some indefinite number selected at random. An extended illustration of this proposition advanced by counsel is given in the brief, and we will quote it in full as a basis of our explanation of the views of the court. It is as follows: "Let me give a practical concrete illustration of this proposition, for the purpose of testing its accuracy, and of showing that the above statement is correct. Let it be admitted that the volume of business at Friend, Nebraska, for the year 1905, was \$65,000, that is, that there was purchased at that point by the appellant during the year 1905, altogether, \$65,000 worth of grain. This was made up of a great number of items that were purchased during the year and is the aggregate of all of the different purchases made by that company at that point during the year. Now, if we use 20 as the divisor for the purpose of getting the average capital on any given day (I take 20 as the divisor because that is the number used in this county and many others), I shall get the average capital, which will be \$3,250. Now, suppose one of the items that goes to make up the \$65,000 is a \$5,000 purchase of grain which is still in the elevator at the date of assessment. Should this grain be assessed separately as tangible property? If so, then the assessment would stand thus:

Average capital\$3,250

Amount on hand as tangible property.... 5,000

Total assessment\$8,250

Can it be successfully contended by anyone that in this method or process you have not assessed the \$5,000 of grain twice, once as average capital and once as tangible property?" This proposition of counsel shows two important particulars in which the court has been misunderstood:

First. We do not consider that average capital can be found by adding the total of purchases during the year and dividing that amount by any number whatever,

much less by an indefinite number selected at random. If the grain dealer should purchase \$10,000 worth of grain each day during the year, or on each one of 300 days during the year, and should sell the grain so purchased on each succeeding day, the total amount of purchases would be \$3,000,000, and if we select the divisor at random, say 20, "because that is the number used in this county and many others," we would have an average capital of \$150,000; whereas the capital needed for such transactions during the year would be only \$20,000. The amount received for the second day's sale could be used for the third day's purchase. It is very plain that the average of the purchases would not be the average of the capital invested, and this fundamental error runs through the entire brief. The average capital could not in any event be ascertained by using an arbitrary divisor. In the above demonstration taken from the appellant's brief the divisor 20 is used "because that is the number used in this county." Manifestly counsel would have as readily accepted any other number as a divisor. If he had happened to have selected 25 as a divisor the average capital would have been \$2,600 instead of \$3,250. If he had taken 12, the number of months in the year, as a divisor, as was done in the Louisiana case cited in the opinion, the average capital would have been \$5,416.66 $\frac{2}{3}$; and, again, if he had selected 52 as a divisor, the number of weeks in the year, the average capital would have been \$1,250. Manifestly the average capital used in a given business cannot be ascertained by such methods.

Second. Counsel understands the opinion to mean that the average capital used in the business is to be ascertained by some method and is to be assessed at all events, and, in addition to this average capital, the real estate and all tangible property is to be assessed also, whereas the view of the court is that all tangible property of a grain dealer is to be assessed in precisely the same manner as the property of other persons and corporations is assessed. In addition to this, the assessor is to ascer-

tain whether this result is a fair assessment of the grain dealer's property used in the business. If he finds no grain or cash on hand, and all other elements of the property used in the business remain substantially constant during the year, it would be manifest that by assessing the tangible property found by the assessor he would not have reached all of the property used in the business. It is only in such case that he is required to assess average capital, and it is not the total average capital that he is to assess, but it is the average amount of capital invested in the business, exclusive of real estate and other tangible property assessed separately. If the real estate and other tangible property which is assessed is not equal to the money and property used in the business on an average during the year, then he is to add to the value of the real estate and tangible property an assessment of the average amount of capital in excess of the real estate and tangible property. This average amount of capital in excess of the real estate and tangible property he is to determine from the books of account and checkbooks, as pointed out in the statute. In determining this excess of capital above the amount which he finds as tangible property, he is not confined to the purchases of grain nor to the sales of grain, nor is he to use arbitrary divisors. If the grain dealer is to be assessed only upon the property in sight on any given day, and we suppose that he is dishonest enough to seek to avoid taxation, his cash and grain can be so manipulated by him as to bring about that result. If, on the other hand, we suppose (which would, of course, generally be the case) that he is honest and does not resort to manipulation, then he might be in some cases unjustly taxed. But the law does not assume that he will accumulate grain on the first day of April for the purpose of swelling his assessment. There are, of course, manifest difficulties in the way of accurately determining in all cases the average amount of capital used during the year in excess of the real estate and other tangible property which the assessor can view on the first

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day of April. The legislature evidently supposed that this difficulty in determining the excess of the capital used is not so great as to make it necessary to allow grain dealers to escape a fair assessment by placing their grain and cash beyond the view of the assessor on the first day of April. No scheme of assessment is perfect. If it comes as near an exact equality of assessment as the circumstances of the case will admit, and no manifest injustice is done, it is all that is required.

We think that the statute in question meets this requirement, and that the construction which we have given it is the correct one.

The motion for rehearing is

OVERRULED.

HERMAN STEINKUHLER V. STATE OF NEBRASKA.

FILED OCTOBER 18, 1906. No. 14,648.

1. **Criminal Law: JEOPARDY.** To constitute a former jeopardy, it must appear that the defendant was put upon trial before a court having jurisdiction, upon an indictment or an information sufficient in form and substance to sustain a conviction, and that the jury were impaneled and sworn, and thus charged with his deliverance.
2. **Intoxicating Liquors: ILLEGAL SALE: EVIDENCE: INSTRUCTIONS.** In a prosecution under section 20, ch. 50, Comp. St., for keeping intoxicating liquors for sale in violation of law, the possession of such liquors by the accused is presumptive evidence of guilt in the district court, as well as before the examining magistrate, unless the accused shall satisfactorily account for and explain the possession thereof, and that they were not kept for an unlawful purpose, and it is not error for the district court to so instruct the jury.
3. **Criminal Law: INSTRUCTIONS.** Where, in a criminal prosecution, the court has instructed the jury that the state must prove all of the material averments of the information, naming them, beyond a reasonable doubt, it is not error to afterwards instruct that the burden of proof to establish one of such material averments is

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on the state, without again qualifying such statement by the words "beyond a reasonable doubt."

4. ———: ———. It is not error for the court to refuse to give an instruction relating to the matter of a crime for which the defendant is not on trial.
5. Evidence examined, and found sufficient to sustain the verdict.

ERROR to the district court for Otoe county: .PAUL JESSEN, JUDGE. *Affirmed.*

W. F. Moran and A. P. Moran, for plaintiff in error.

Norris Brown, Attorney General, W. T. Thompson and A. A. Bischof, *contra.*

BARNES, J.

It appears from the record in this case that on the 7th day of November, 1904, a complaint was filed before the county judge of Otoe county, charging the plaintiff, Herman Steinkuhler, hereafter called the defendant, with a violation of section 7170, Ann. St., by unlawfully keeping intoxicating liquors for sale. He was arrested, brought before the court, and in due time a preliminary examination was had, which resulted in his being bound over to appear at the next regular term of the district court to answer to said charge. On February 6, 1905, the county attorney of Otoe county filed an information in said court, charging him with a violation of said section; and on the 14th of that month a jury was regularly impaneled to try the cause. After the state had introduced all of its evidence and rested its case, the defendant moved the court to dismiss the information, and discharge him, for the reason that the complaint did not state a cause of action. The court overruled the motion; the defendant rested his case without the introduction of any evidence, and thereupon the county attorney asked leave to file an amended information, which was granted. A juror was withdrawn, and the case was continued until the next regular term of court. Thereafter the county attorney filed an amended information, to which the defendant interposed a plea in

bar, which set out the former information in full, and alleged that the defendant had been theretofore placed in jeopardy by reason of the former proceedings. The state demurred to this plea; the demurrer was sustained, and the defendant excepted. Thereafter a jury was impaneled, and the cause tried, over the defendant's objections. The trial resulted in a conviction; the defendant was sentenced to pay a fine of \$100 and costs of the prosecution, and, to reverse said judgment, he has brought the case here by petition in error.

1. Defendant first contends that the court erred in sustaining the state's demurrer to his plea in bar. It appears from the record that the original information charged the defendant with a violation of the section of the statute above mentioned, upon information and belief only. The charging part thereof was as follows: "Be it remembered that A. A. Bischof, county attorney in and for Otoe county, and in the second judicial district of the state of Nebraska, who prosecutes in the name and by the authority of the state of Nebraska, comes here in person into court, at this, the February term, A. D. 1905, thereof, and, for the state of Nebraska, gives the court to understand and be informed that he has reason to believe, and does believe, that intoxicating liquors, to wit, beer, whiskey and alcohol were unlawfully and wilfully kept by one Herman Steinkuhler, in a certain one story frame building (describing it) in the village of Burr, in said county, * * * and that said liquors above described were intended to be, and were, then and there being, by and under the direction of said Herman Steinkuhler, unlawfully and wilfully sold." It will be observed that the information above mentioned, in form and substance, was the same as the one in *Sothman v. State*, 66 Neb. 302, where it was said:

"An information upon which the party charged is to be put on trial, which, instead of charging an offense in positive terms, merely charges that the county attorney 'has reason to believe and does believe' that the acts con-

stituting the offense have been committed by the accused, is vulnerable to a demurrer."

So, it seems clear, that the original information in this case was insufficient to charge the defendant with the commission of any offense against the laws of this state. The rule is fundamental that a prosecution had upon an information which does not charge a person with a crime is no bar to a subsequent prosecution upon a valid information. Maxwell, Criminal Procedure, p. 566. To show a former jeopardy it must appear that the party was put upon trial before a court having jurisdiction, upon an indictment or an information sufficient in form and substance to sustain a conviction, and that the jury was impaneled and sworn, and thus charged with his deliverance. 17 Am. & Eng. Ency. Law (2d ed.), p. 584; *Dulin v. Lillard*, 91 Va. 718. So, we are of opinion that the trial court did not err in overruling the defendant's plea.

2. As a second cause for reversal, defendant claims that the trial court erred in giving instruction No. 5, on his own motion, which is as follows: "It is admitted by the defendant on the stand that certain whiskey was found in his possession on the 7th day of November, 1904, and, so far as the allegation in this information charges the defendant with having whiskey in his possession for the purpose of selling the same on said day, you are instructed that, after the state has shown that the defendant was in the possession of whiskey in his place of business on the 7th day of November, 1904, the law presumes that such liquors were kept in violation of law, and unless the defendant has satisfactorily accounted for, and explained the possession of such liquors, then you would be justified in believing that said whiskey was kept for the purpose of sale. But if, after weighing all the testimony on this point, you believe that the defendant has satisfactorily accounted for the possession of said whiskey, and believe it was not kept by him for the purpose of sale, then you should return a verdict of not guilty, so far as keeping whiskey is concerned."

It is argued by the defendant that the jury should have been instructed, in substance, that, after weighing all of the evidence, if the jury believed that the possession of the whiskey by the defendant had not been satisfactorily accounted for, and that the jury still believed, beyond a reasonable doubt, that the whiskey was kept for the purpose of sale, then the defendant should be found guilty. This is all the argument made in support of the second assignment of error, and we are left somewhat in doubt as to the defendant's reason for urging it. It may be said, however, that this question seems to have been settled by *O'Neill v. State*, 76 Neb. 44, and *Peterson v. State*, 64 Neb. 875, where it was held that, "in a prosecution under section 20, ch. 50, Comp. St., for keeping intoxicating liquors for sale in violation of law, the possession of such liquors by the accused is presumptive evidence of guilt in the district court, as well as before the examining magistrate, unless the accused 'shall satisfactorily account for and explain the possession thereof, and that they were not kept for an unlawful purpose.'"

Again, the record discloses that the court gave the usual charge as to the presumption of innocence, and a further instruction that the jury must be convinced of the truth of all of the material averments of the information (setting out and describing them) beyond a reasonable doubt. So, reading all of the instructions together, we are unable to see how the defendant could have been prejudiced by the instruction complained of.

3. Defendant's third complaint is that the court erred in giving instruction No. 7, on his own motion. By that instruction the jury were told that beer and whiskey were both intoxicating liquors, as that term is used in the statutes. But whether or not the liquids introduced in evidence, known as "Ino," "Hop Ale," and "Nerve Tonic," are intoxicating liquors was a question of fact to be determined from all of the evidence in the case, and the burden of proof was on the state to establish the fact that such liquids were intoxicating liquors, and that said liquors

contained sufficient alcohol to produce intoxication when drunk by an individual. The objection urged against this instruction is, in substance, that the jury should have been told that the state must prove that the liquids therein described were intoxicating beyond a reasonable doubt. It is a sufficient answer to this objection to say that by the instruction complained of the court did not attempt to inform the jury that the fact in question could be established by a preponderance of the evidence. The jury were told that the burden of proof was on the state to establish this fact, and by paragraph No. 3 of the instructions the court had already stated that this fact must be established by the state beyond a reasonable doubt. So, it seems clear that the jury could not have been misled by this instruction.

4. The fourth assignment of error urged is that the court erred in not giving instruction No. 3, requested by the defendant, which is as follows: "You are instructed that, before you can convict the defendant for selling intoxicating liquors without a license, the state must establish, beyond a reasonable doubt, that the liquors introduced in evidence, except the whiskey, contained alcohol in sufficient quantities to produce intoxication of a human being." This assignment cannot be sustained, because the prosecution in this case was not one for selling intoxicating liquors without a license, but was for the crime of keeping such liquors for sale, as defined by section 7170, Ann. St. The instruction treats alone of the crime of selling intoxicating liquors without a license, and has no application to the charge on which the defendant was being tried, and the evidence adduced in support of it. Therefore it seems clear that the court was justified in refusing to give this instruction.

5. Lastly, it is contended that the evidence is insufficient to sustain the verdict. It would serve no useful purpose to quote the evidence contained in the record in order to show that it was sufficient to sustain the conviction. It is enough to say that at the time the warrant

was issued the officer who served it seized, and took charge of, a large quantity of whiskey, consisting of some 30 or more quart bottles; some liquid contained in ordinary beer bottles, labeled "Ino"; a considerable number of such bottles, labeled "Hop Ale," and a liquid called "Nerve Tonic." Now, while some of the defendant's witnesses testified that these liquids were not intoxicating, yet others testified that they had purchased them of the defendant frequently, at his place of business; that they looked like beer and tasted like it, although they did not think they were intoxicating. The bill of exceptions also contains the testimony of the state chemist, who analyzed samples of these liquors and found that all of them contained more or less alcohol, some of them containing about the same proportion thereof as was found by him in "lager beer." It should be stated, at this point, that the defendant alleges error in the introduction of this evidence, but as no reasons are given to support this assignment we are constrained to disregard it, and hold the evidence to be competent. It was further shown that the bottles of liquids in question were procured by the defendant of the "Storz Brewing Company" of Omaha, Nebraska, and that he receipted at the express office for, and took into his possession the whiskey which was found in his place of business. It is true that the defendant's brother and another witness testified that the whiskey belonged to them, yet, notwithstanding this testimony, the jury were justified in disbelieving these witnesses, and in finding that the liquors belong to, and were kept by, the defendant with the intent and for the purpose of unlawfully selling them.

From an examination of the whole record, we are satisfied that the defendant had a fair trial; that the evidence was sufficient to sustain the verdict; that the record contains no reversible error, and therefore the judgment of the district court is

AFFIRMED.

WILLIAM H. THOMPSON, APPELLEE, v. LYDIA E. POPE, EXECUTRIX, APPELLANT.

FILED OCTOBER 18, 1906. No. 14,566.

1. **Executors: APPEAL: BOND.** An executor and residuary legatee who has given a bond to pay the debts and legacies of the testator under section 5030, Ann. St., may appeal from a judgment of the county court allowing a claim against the estate without giving an appeal bond.
2. **Cases Distinguished.** *Buel v. Dickey*, 9 Neb. 285, and *Herditchka v. Foss*, 2 Neb. (Unof.) 428, distinguished.

APPEAL from the district court for Merrick county: CONRAD HOLLENBECK, JUDGE. *Reversed.*

Patterson & Patterson, F. Dolczal and J. J. Sullivan, for appellant.

C. G. Ryan and Martin & Ayres, contra.

LETTON, J.

James H. Pope died in 1904 in Merrick county, Nebraska, leaving a last will and testament which was duly probated in that county. In the will, his wife, Lydia E. Pope, was named as executrix and also as the residuary legatee of the estate. Upon the probate of the will she gave a bond as executrix and residuary legatee to pay the debts and legacies of the estate under the provisions of section 5030, Ann. St., which bond was duly approved. A number of claims were filed against the estate, one being that of William H. Thompson, the appellee, for legal services rendered the estate. The claim was objected to by the executrix, she alleging that such services had been rendered by the claimant for her personally and were not proper matters of charge against the estate of James H. Pope. After a hearing the county court found for the claimant and allowed the claim for the sum of \$1,047.99 against the estate. From this judg-

ment the executrix appealed to the district court, but did not file any bond upon such appeal, relying upon the provisions of sections 4825 and 5190, Ann. St. Section 4825 provides generally for appeals from a probate court in all matters of probate jurisdiction, and further provides that an executor, administrator, guardian or guardian *ad litem* shall not be required to enter into bond in order to enable him to appeal. Section 5190 provides as follows: "Every executor or administrator who may have given bond in this state with surety agreeable to law, shall be authorized in all cases of appeal from one court to another, by him made, to prosecute the same without filing an appeal bond. Such appeal to be prosecuted to the district court as appeals are now taken from courts of justices of the peace." The question to determine is whether a residuary legatee who has given the bond prescribed by section 5030 to pay the debts and legacies, instead of the bond provided for in section 5029—which applies to executors generally, and is conditioned in substance that they shall return an inventory of the estate, shall administer the same according to law and out of the same pay the debts and legacies, render an account within one year, and perform all orders and decrees of the probate court—may appeal from the allowance of a claim against the estate by the county court without executing and filing an appeal bond.

The general rule with reference to giving of appeal bonds by executors and administrators is that wherever the judgment which is appealed from affects only the assets of the decedent in his hands for administration, no appeal bond is required, for the giving of a bond might render the executor personally liable to an amount greater than the assets of the estate in his possession; but that where an executor or administrator is in a position in which a personal judgment or decree can be rendered against him and in which he may or ought to be responsible out of his own funds, then he should be required to give an appeal bond the same as other persons. *Wade*

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v. American Colonization Society, 4 S. & M. (Miss.) 670; *Pugh's Exrs. v. Jones*, 6 Leigh (Va.), 299; *Erskine v. Henry*, 6 Leigh (Va.), 378; *Pugh v. Ottenkirk*, 3 Watts & Serg. (Pa.) 170. In this case the court say: "It is the character of the suit that determines this right (to appeal without bond), and that does not depend on the mere naming the party as executor or administrator in the process or declaration, but upon the cause of action as developed in the pleadings, and whether the recovery is sought in a representative or individual capacity." In *Rhea v. Brown*, 4 Neb. (Unof.) 461, it is said: "It may well be said that section 44, ch. 20, and section 234, ch. 23, Comp. St., rightly construed mean only that executors, administrators and guardians are not required to give bond when they appeal in their representative capacities, and that when they appeal in their personal capacities, from judgments rendered against

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 LETTON, J. ^{who has given a bond to pay}

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In this connection it is important to consider the statutory provisions with reference to the rights of creditors in the estate of a deceased person. Section 4988, Ann. St., provides: "Every person of full age and sound mind, being seized in his own right of any lands, or any right thereto, or entitled to any interest therein descendable to his heirs, may devise and dispose of the same by his last will and testament in writing; all such estates not disposed of by will shall descend as the estate of an intestate, being chargeable in both cases with the payment of all debts." Section 5017 is as follows: "All the estate of the testator, real and personal, shall be liable to be disposed of for the payment of his debts and the expenses of administering his estate." By succeeding sections it is provided in substance that the estate given by the will to any devisees or legatees shall be held liable to the payment of the debts and expenses, in proportion to the amount of the devise or bequest; that devisees or legatees who shall, with the consent of the executor, have taken possession of the estate before such liability is settled, shall hold the same subject thereto and shall be held to contribute for the payment of debts and expenses. The statute further provides that if the personal estate not disposed of by last will shall amount to more than \$500, and more than certain allowances to the widow and children of the deceased, the same shall be applied to the payment of debts, funeral expenses and expenses of administration, and that the residue, if any, shall be distributed among the heirs. It will be seen, therefore, that as to both the real estate and the personal property of the deceased, the statute especially provides that the estate is charged with and subject to the claims of creditors.

The view has been taken that the giving of a bond to pay the debts and legacies by an executor and residuary legatee administers the estate; that the bond is substituted for the assets, and that creditors and legatees thereafter cannot follow the estate, but are confined to a remedy upon the bond. It is said by the appellee that

this question has already been determined in this state in the cases of *Buel v. Dickey*, 9 Neb. 285, and *Herditchka v. Foss*, 2 Neb. (Unof.) 428. *Buel v. Dickey* was an action upon the bond of a residuary legatee, and it was claimed by him that unless assets were shown to have come into his hands he was not liable upon the bond, but it was held that the bond was conclusive evidence of assets with which to meet the debts and legacies of the testator, citing *Jones v. Richardson*, 5 Met. (Mass.) 247, and *Colwell v. Alger*, 5 Gray (Mass.), 67. It is true it is said in the opinion that by giving this bond he "deprived the court of all control over his management of the property, which, whether much or little, practically became his own to dispose of as he saw fit. The probate court, it is true, could fix a time within which the payment of debts and legacies should be made, and order it done; but beyond this the court could not go, except upon proper application to authorize forcible collection by suit on the bond," but this was unnecessary to the decision and is mere dictum. In *Herditchka v. Foss*, 2 Neb. (Unof.) 428, two points were decided: First, that the legacies in controversy were made a charge upon the land of the deceased; and, second, that the bond which was given did not comply with the provisions of the statute with reference to the giving of bonds by an executor and residuary legatee under section 5030, Ann. St. There was an obiter remark that when a bond under this section is given the bond takes the place of the property, so far as creditors and other legatees are concerned, citing *Buel v. Dickey*, *supra*, but the point was not in issue in this case and was not decided. The question, then, is of first impression in this state.

In order to a proper determination of the question involved, a consideration of the history of the statutory provisions is necessary. Our statutes with reference to the collection and administration of the estates of deceased persons derive their origin in the first place from Massachusetts. It has been said that they have come to us by

way of New Hampshire, Michigan and Wisconsin, but, whether this be so or not, the fact is that, while modifications and changes have been made in matters of procedure, a number of the most important provisions are identical with laws of Massachusetts which date back for many years. The first statute with reference to wills in the colony of Massachusetts Bay was passed in 1649. This act provided penalties for neglect upon the part of executors to make probate of wills in the county court or to file a true inventory of the deceased's estate, and against any one alienating or embezzling any lands or goods of the deceased, and provided for the administration of intestate estates. In 1685, as an addition to this act, it was provided that the court might summon any executor who had offered a will for probate, requiring him to give bond with sufficient sureties for paying all debts or legacies, or to make and exhibit unto the court upon oath a just and true inventory of the estate of the deceased, and provided penalties for refusal or neglect. Ancient Charters and Laws of Massachusetts Bay, p. 204. A later statute, 2 Anne (1703), Ancient Charters and Laws, *supra*, p. 377, reenacted the foregoing provisions and prescribed other matters of procedure in case of defaulting executors, and a still later law imposed penalties for the failure to file inventory. 12 Geo. II (1738), Ancient Charters and Laws, *supra*, p. 518. The first Massachusetts case which has any bearing upon the question is *Gore v. Brazier*, 3 Mass. *523, *542, decided in 1807. A Massachusetts statute of 1783 provided that the real estate of any deceased person shall be liable to be taken by execution upon judgments recovered against executors or administrators for debts of the deceased, the same as in other cases. Another provision enacted that the real estate of which any person should die seized should be chargeable with all the debts of the deceased, and that an executor who is residuary legatee might give bond to pay the debts and legacies. The executor and residuary legatee of the estate of one Gill, who

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had given bond to pay the debts and legacies, sold certain real estate belonging to the estate. Afterwards a creditor of the deceased recovered judgment against the estate and caused an execution to be levied on the real estate. The action was for a breach of the covenants in the deed made to the purchaser by the residuary legatee. It is said by Chief Justice Parsons: "The last objection that remains to be considered, is grounded on the probate bond given in this case for the payment of debts and legacies. And if the giving of this bond is in law a discharge of the testator's lands from a lien imposed upon them by the statute, the defendant must recover. But we are all of opinion that this bond is no discharge of the lien. Before the provincial statute of 1 and 2 Anne, ch. 5, all executors were bound to inventory and account for the testator's estate. This was necessary to furnish the creditors and legatees with evidence to charge them with waste, if any assets were embezzled or unaccounted for. When the legacies are specific, or to be ascertained without inventory or account, and the executor be the residuary legatee, if the legatees and creditors can be secured, there can be no occasion for an inventory or account. In this case that statute relieves the executor from this duty, on his giving bond with sureties to the judge of probate for the payment of the debts and legacies. * * * This lien remains in full force, and the benefit to be derived by a creditor or legatee from the bond is merely cumulative."

In 1819 *Thompson v. Brown*, 16 Mass. *172, was decided. The court held that a license to an executor and residuary legatee who had given bond to pay debts and legacies was void; that such an executor ought not to have a license to sell the real estate and discharge his obligations; that a license was unnecessary since he could convey a perfect title without it. It was said by Parker, C. J., speaking of the bond given by the residuary legatee: "The bond so given is the security intended by the statute for the creditors and legatees. * * * We think it clear that no executor, who is residuary devisee, and

has acquired a perfect title to the estate, by giving the bond required by law, for the payment of the debts and legacies, ought to have license to sell the real estate, to discharge his obligations. Nor is such license in any degree necessary; as an executor, so circumstanced, may sell without such license." The statement that the executor "acquired a perfect title to the estate," while in one sense true, was unnecessary to a decision of the case and has been the source of much confusion in later decisions.

Again, in 1827, in the case of *Clarke v. Tufts*, 5 Pick. (Mass.) 337, following the case of *Thompson v. Brown*, *supra*, the same judge writing the opinion said: "The legislature has made such bond a substitute for the estate of the deceased, so that there is no longer any lien upon the real or personal estate of the testator by his creditors, after the executors shall have conveyed the same to *bona fide* purchasers. Whether such creditors, having obtained judgment and execution against an executor who has given such bond, can levy upon the estate devised, before any conveyance of it, may be matter of inquiry in some future action." The doctrine of these cases, so far as they hold that the bond is substituted for the estate and the lien discharged, is apparently inconsistent with *Gore v. Brazier*, *supra*, and neither opinion cites that case. Yet, in view of the above query in *Clarke v. Tufts*, *supra*, it may be questioned whether Judge Parker intended his language to convey the meaning which has been ascribed to it.

In 1834 a commission which had been appointed to revise the statutes of Massachusetts reported to the legislature, and in this report embodied a statutory provision that the giving of a bond to pay the debts and legacies by the residuary legatee should not discharge the lien upon the real estate of the testator for the payment of his debts, except where sold to a *bona fide* purchaser. With reference to this new section the commissioners say in their report: "This section is new in terms; but it is in con-

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firmation of the construction given by the supreme court to the corresponding provision in the statute of 1788, ch. 24. See 3 Mass. *523, *542. The exception as to land conveyed by the executor is not noticed in that case but it may be necessary in order to enable the executor to pay the debts and legacies according to the condition of his bond. * * * When an administrator has sold a piece of land belonging to the intestate for the payment of his debts, that piece is forever discharged from the lien, although the proceeds of the sale should be wasted, and never applied to the payment of the debts. The creditors in such a case have the remedy against the administrator and his sureties. So in the case under consideration, the land having been once lawfully appropriated for the payment of the debts, ought to be forever discharged; and the creditors should look for their remedy to the executor and his sureties." The recommendation of the commission was embodied in the revised statutes of 1836 as section 4, of ch. 63, so that since that time in Massachusetts the statutory provision has been declaratory of the law as announced in *Gore v. Brazier*, *supra*. The first case arising after the passage of this act was *Jones v. Richardson*, 5 Met. (Mass.) 247, decided in 1842, wherein it is said by Chief Justice Shaw: "Perhaps it may be said, that by the express condition of the bond, the executor and his sureties are bound to pay the debts and legacies; that creditors or legatees have a remedy, in the name of the judge of probate, on the bond; and that such is their only remedy. But this is opposed, both by the statute and by a long course of decisions." Later Massachusetts cases, *Holden v. Fletcher*, 6 Cush. (Mass.) 235; *Alger v. Colwell*, 2 Gray (Mass.), 404; *Colwell v. Alger*, 5 Gray (Mass.), 67; *National Bank of Troy v. Stanton*, 116 Mass. 435; *Thayer v. Winchester*, 133 Mass. 447; *Jenkins v. Wood*, 134 Mass. 115; *Jenkins v. Wood*, 140 Mass. 66; *Collins v. Collins*, 140 Mass. 502, are in harmony with *Gore v. Brazier*, *supra*. In *Collins v. Collins*, 140 Mass. 502, decided in 1885, Collins had made a will by which

he gave his wife, who was residuary legatee and executrix, a legacy of \$500 in trust for his granddaughter, an infant. The executrix gave the statutory bond to pay the debts and legacies. She died without having paid the legacy, and the defendant was appointed administrator *de bonis non* with the will annexed, and gave the usual bond. The legacy not having been paid, the granddaughter sued the administrator *de bonis non* for its payment. The first defense relied on was that by the giving of the statutory bond the wife made the estate her own, and that it could not be followed into the defendant's hands by a legatee having no specific charge upon it. The court held that this defense could not be maintained, saying: "It is true that the bond made the executrix personally liable upon it to the extent of its penalty, but that is not sufficient to exonerate the estate unless the statutes provide that it shall have that effect. We find no such provision. On the contrary, it is expressly provided in the Pub. St. ch. 129, sec. 7, that the lien of creditors on the real estate shall be preserved, except on such part as shall be sold to a *bona fide* purchaser for value." It will be seen therefore that the supreme court of Massachusetts has finally returned to the sound basis of *Gore v. Brazier*, *supra*, and has apparently ignored the language in *Thompson v. Brown* and *Clarke v. Tufts*, *supra*.

In the state of Michigan, one of the first cases in which the proper construction of the statutory provisions under consideration was involved was *Hatheway v. Weeks*, 34 Mich. 237. This case was decided in 1876, and held, citing *Colwell v. Alger*, *supra*, that the giving of a bond as residuary legatee and executor to pay the debts and legacies conclusively admits assets, and that such executor by the giving of the bond became the absolute owner of the property of deceased. This case was followed in a series of cases arising out of the settlement of the estate of Gilbert Hatheway. See *McElroy v. Hatheway*, 34 Mich. 399; *Wheeler v. Hatheway*, 54 Mich. 547. These cases held in substance that by the giving of such a bond

the residuary legatee becomes the owner of the estate of the deceased, that the property is discharged from any liability for the debts of the deceased, and that the creditors and legatees cannot look to the estate of the deceased undisposed of in his hands, but must rely exclusively upon him and his bondsmen for the payment of their claims. In 1889, however, the question was reexamined in the case of *Lafferty v. People's Savings Bank*, 76 Mich. 35, and it was held by the court, two of the five judges of the court dissenting, that the title of a residuary legatee is not absolute, but is held subject to the payment of the testator's debts; that upon his removal the title to the property of the testator remaining undisposed of in his hands reverts to the estate and becomes vested in the administrator *de bonis non*; that he cannot be sued personally for a debt due from the testator, but only officially as executor; that his authority to sell real estate belonging to the estate is as executor, and not personally, and that an estate is not regarded as administered until the assets have been collected and applied as required by law or the will of the testator, and that until fully administered the probate court has jurisdiction in the matter of the proceedings. The opinion is lengthy and elaborate. It cites and examined the course of legislation and litigation in Massachusetts upon the points involved. In the dissenting opinion the argument is made that the laws of Michigan are not identical with those of Massachusetts, and that it is violating all the rules of decision to override what has been considered the law of Michigan and follow the decisions of another state, and that to overrule the prior cases would be to throw the laws as declared into confusion. The dissenting opinion further points out differences in the method of probate administration in Michigan from those prevailing in the state of Massachusetts. From this resume it appears that the courts of Massachusetts and Michigan now take the same view of the effect of these statutes. In Wisconsin, how-

ever, the doctrine of *Thompson v. Brown, supra*, is still adhered to. *Cole's Will*, 52 Wis. 591.

To give the law the effect contended for by the appellee would nullify the sections which make the estate of the deceased liable to the claims of creditors, and would substitute in many cases the uncertainty and vexation of an action upon a bond for the certainty of a recourse to the estate of the deceased remaining undisposed of in the hands of the executor. Such construction, to our mind, would be unfair to creditors. In many, and, perhaps, in most instances credit is extended upon the faith of the estate of the debtor, and with the expectation and reliance upon the part of the creditor that in case of death the property of the deceased will be subject to the payment of his just demands. The idea that the giving of such a bond removes the liability of the assets of the estate to be subjected to the payment of the debts of the testator, and substitutes therefor the personal responsibility of the executor and his sureties to the amount of the penalty in the bond, finds no support in any statute, but seems, so far as the writer can ascertain, to have taken its origin in the opinion of Parker, C. J., in the case of *Thompson v. Broirn, supra*, and this doctrine was promptly repudiated by the people of the state of Massachusetts upon the recommendation of the commissioners to revise the laws. We are convinced that the reasoning of the later cases, *National Bank of Troy v. Stanton, supra*, and *Collins v. Collins, supra*, and *Lafferty v. Peoples Savings Bank, supra*, is much to be preferred to that of Chief Justice Parker or to the implications in the earlier Michigan cases. The giving of a bond to pay the debts and legacies by an executor and residuary legatee, therefore, is merely cumulative and adds the security of the bond to the provisions already made for the preservation of the rights of creditors. It is true, as was said in *Buel v. Dickey, supra*, that by the giving of this bond the executor relieved himself of the duty of returning an inventory of the estate and that the property practically became his own to dis-

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pose of as he saw fit, but this does not close the administration. The condition is similar to one of ordinary administration wherein the executor has been ordered by the probate court to sell sufficient of the personal property to pay the debts. The property that he disposes of for that purpose carries with it a perfect title, but that which remains in his hands is still subject to be sold for the debts of the estate. And so with an executor who has given bond to pay the debts and legacies. If he fail to do so and there remain in his hands, undisposed of, assets of the estate, the creditor may have the same remedies against him as in other cases by citation and removal and the appointment of an administrator *de bonis non*, and may have the remaining assets applied in satisfaction of his debt. Hence, when such an executor appeals from the allowance of a claim he appeals in his representative capacity as executor, even though he has a direct personal interest in reducing the amount of the claims against the estate in order that the mass of his residuary estate may be larger. In taking an ordinary executor's bond, the county court should look to the assets and fix the penalty at an amount sufficient to guarantee a faithful administration of the trust and to account for the proceeds of the estate, but, in case of the bond of an executor and residuary legatee, the interests of the creditors and legatees are to be looked to and the bond should be ample to cover all probable claims against the estate. It is true the bond is an admission of assets, but it may be questioned whether it is an admission of assets to a greater amount than the penalty in the bond.

Upon the whole case, we are of opinion that an executor and residuary legatee who has given bond under the provisions of section 5030, Ann. St., is absolved from the necessity of giving an appeal bond in cases which involve a contest upon claims against the estate. The judgment of the district court dismissing the appeal is therefore erroneous, and it is reversed and the cause remanded for further proceedings.

REVERSED.

NINA V. WILSON, ADMINISTRATRIX, APPELLEE, v. WILLIAM
WHITE ET AL., APPELLANTS.

FILED OCTOBER 18, 1906. No. 14,451.

1. **County Court: APPEAL: JUDGMENT.** Upon an appeal from a judgment of a county court rendered in a cause prosecuted before the county judge in his capacity as a justice of the peace, a recovery cannot be had in excess of his jurisdiction in that capacity.
2. **Trespass: JOINT LIABILITY.** Several owners of animals who have constituted of them a common or joint herd are jointly liable for trespasses committed by such herd.

APPEAL from the district court for Cherry county:
JAMES J. HARRINGTON, JUDGE. *Affirmed on condition.*

John M. Tucker, E. D. Clarke and Robert G. Easley,
for appellants.

Walcott & Morrissey, contra.

AMES, C.

This is an appeal from a judgment rendered in the district court on an appeal from a judgment of a county court in an action to recover damages for a trespass. It sufficiently appears from the transcript returned by the county judge that the suit was begun before him in his capacity as a justice of the peace. A copy of the summons is not included therein, but it appears that a bill of particulars praying judgment for \$200 was filed on the 28th day of April, and that the process was issued on that day and made returnable on the 7th day of May following, and was duly served and returned within that time. The defendants appeared at the time named in the writ and proceeded to trial without pleadings on their part, and suffered a recovery for the amount demanded, from which they prosecuted an appeal to the district court. In the latter court the judge permitted a petition to be filed claiming damages in the sum of \$246, for which amount

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the plaintiff recovered a verdict and judgment, from which this appeal is prosecuted.

Due objection and exception was taken in a motion for a new trial to the order of the court permitting an amendment of the petition increasing the claim of damages beyond \$200 and to the amount of the recovery in excess of that sum. We think the court erred in overruling the objection. The case falls clearly within the principle of *Union P. R. Co. v. Ogilvy*, 18 Neb. 638, and the cases there cited. It is evident that the county court upon the record before it was without jurisdiction to render a judgment in excess of \$200, and this limitation of power adhered to the case in the district court, and has been held to be, as to the excess, a want of jurisdiction over the subject matter.

The plaintiff, as administratrix of her deceased husband, was in possession of a tract of land upon which she was cultivating a forty-acre field of corn. The defendants were in the joint, or at least common, occupation of an adjoining cattle range, and each of them owned animals going to make up a herd that pastured the range, and that committed the trespass and inflicted the damage complained of and for which the recovery was had. There is practically no dispute as to these facts, but it is objected in this court for the first time that there is a misjoinder of parties defendant, or, in other words, that the trespasses were several because of the several ownership of the animals, and that a recovery cannot be had against all the defendants in one action. We will not inquire whether the objection, if it had been valid, would have been waived by failure to make it in the lower courts or either of them. It is clear to us that it would not have been valid if it had been so made. The defendants jointly created the herd, and jointly permitted it to depasture the range and to trespass upon the plaintiff's land. It is manifestly impossible to ascertain in what degree the animals of each contributed to the resulting injury. *Jack v. Hudnall*, 25 Ohio St. 255.

Marquis v. Tri-State Land Co.

We recommend that the plaintiff be required to remit, as of the date of the rendition of the judgment in the district court, all in excess of \$200 and interest thereon from the date of judgment in the justice's court, and that upon her failure so to do within 30 days from this date the judgment stand reversed and a new trial granted, but that upon her having filed with the clerk of this court within the time aforesaid a remittitur to that amount the judgment stand affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the plaintiff be required to remit, as of the date of the rendition of the judgment in the district court, all in excess of \$200 and interest thereon from the date of judgment in the justice's court, and that upon her failure so to do within 30 days from this date the judgment stand reversed and a new trial granted, but that upon her having filed with the clerk of this court within the time aforesaid a remittitur to that amount the judgment stand affirmed.

JUDGMENT ACCORDINGLY.

LEWIS C. MARQUIS, APPELLANT, V. TRI-STATE LAND COMPANY ET AL., APPELLEES.

FILED OCTOBER 18, 1906. No. 14,358.

1. **Sales: FRAUD: RESCISSION.** Relief or redress will not be granted, either by way of rescission or by way of damages, at law or in equity, if it clearly appears that the party complaining has not sustained any pecuniary damages, nor been otherwise put in any worse position than he would have occupied if there had been no fraud.
2. **Petition examined, and held obnoxious to a demurrer *ore tenus*.**

APPEAL from the district court for Scott's Bluff county. HANSON M. GRIMES, JUDGE. *Affirmed.*

Gardner & White, for appellant.

Wright & Wright, *W. A. Dilworth* and *J. E. Kelby*, *contra.*

OLDHAM, C.

This was an action for the rescission of a contract of sale of six shares of stock in the Winters Creek Irrigation Company, a corporation doing business in Scott's Bluff county, Nebraska, coupled with an application for an injunction to restrain the transfer of the stock on the books of the company. The material allegations of the petition, for which equitable relief is prayed, are that, at and before the sale of the shares of stock to the defendants, plaintiff was the owner of a large tract of land in Scott's Bluff county, on which he resided, and which was irrigated from the waters of the Winters Creek Irrigation Company's ditches; that the shares of stock owned by him were of the par value of \$100 a share; that by reason of plaintiff being a stockholder in the irrigation company, he was enabled to assist in fixing rates for water rent to be charged by the company, and by having such rates made very low and reasonable the price of the lands owned by plaintiff and irrigated from the ditches was considerably enhanced; that for this reason his six shares of stock were of a peculiar value to him much in excess of their par value; that the defendants Leavitt and Frank, as agents and managing officers of the Tri-State Land Company, for the purpose of cheating and defrauding plaintiff in the purchase of his shares of stock, falsely represented to him that they had purchased, and owned and controlled, a majority of the shares of the capital stock of the irrigating company, and for this reason could and would control and fix the water rent to be charged by

the company, but that, notwithstanding this fact, they would pay plaintiff \$700 for his six shares of stock; that the defendant Tri-State Land Company owned but a small tract of land under the ditches, and that its interest in the company would be to advance the water rent on lands irrigated under it; that if in fact the defendants had controlled a majority of the stock, plaintiff's six shares would have been of but little value and not worth to exceed \$700; that plaintiff, believing and relying on the above representations, sold and assigned the stock in controversy to the Tri-State Land Company for the sum of \$750, receiving in payment thereof a check on the Nebraska National Bank of Omaha; that it was specially agreed at the time of the sale that, if the defendants did not control a majority of the stock, they would redeliver the six shares of stock to the plaintiff for the amount paid for the same; that, as a matter of fact, the defendants did not own and control a majority of the shares of capital stock of the corporation; and that, when plaintiff learned such fact, he tendered back the amount of the purchase price received and demanded a redelivery of the stock. The prayer of the petition was for a rescission of the contract, and an injunction restraining the transfer of the stock on the books of the company from the plaintiff to the Tri-State Land Company. The court below sustained an objection to any testimony under the pleadings and dismissed the action. To reverse this judgment plaintiff appeals to this court.

The sole question involved is, does the petition, liberally construed, state a cause which entitles plaintiff to a rescission of his contract? The theory on which plaintiff alleges a peculiar value to him in his six shares of stock in the irrigating company is that he owns a very large tract of land which is under the ditches of the company, and that his being a stockholder in the company gave him a voice in keeping down the price of water for irrigating purposes, that is, that it enabled him to enhance the value of his land at the expense of the ditch company.

The next proposition alleged is that the defendants own little land under the ditches; and that, if they control the management of the company, they will raise the price of rents for the purpose of enhancing the value of the stock of the irrigating company; and that, if defendants control the ditch, plaintiff's shares of stock would not be worth to exceed \$700. There is no allegation in the petition as to how many shares of stock defendants did own, or how many shares of stock were issued by the irrigation company, but the mere conclusion that defendants did not own a majority of the stock is set forth in the petition, as well as the allegation that defendants promised that plaintiff might rescind if they did not get a majority of all the stock. There is no allegation that plaintiff did not have access to the books of the company to ascertain the number of shares of stock owned by the defendants when he sold his own shares, and there is no allegation that plaintiff was unable to purchase other shares of stock for the same price that he received for his own.

The only theory on which plaintiff's stock was of special value to him was for the purpose of preventing defendants from controlling the affairs of the company and increasing the rent charged for water on the lands under the ditch. And if, as alleged in the petition, the defendants do not control a majority of the stock, then none other than a mere theoretical injury resulted to plaintiff from the sale of his shares of stock to the defendants.

In the recent case of *Jakway v. Proudfit*, 76 Neb. 62, we had occasion to examine into the nature and character of false representations which would authorize a rescission of a contract and we there quoted with approval the rule announced in 14 Am. & Eng. Ency. Law (2d ed.), p. 140, in which it is said: "Relief or redress will not be granted, either by way of rescission or by way of damages, at law or in equity, if it clearly appears that the party complaining has not sustained any pecuniary damages, nor been otherwise put in any worse position than he would have occupied if there had been no fraud."

Port Huron Machinery Co. v. Bragg.

We therefore conclude that the learned trial court was fully justified in holding plaintiff's petition obnoxious to a demurrer *ore tenus*, and we recommend that the judgment be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

PORT HURON MACHINERY COMPANY, APPELLANT, v. OSCAR BRAGG, APPELLEE.

FILED OCTOBER 18, 1906. No. 14,432.

1. Evidence examined, and *held* sufficient to sustain the judgment of the trial court.
2. Sales: BREACH OF WARRANTY? REVIEW: Action of the trial court in the admission of evidence examined, and *held* not prejudicial.

APPEAL from the district court for Phelps county:
LESLIE G. HURD, JUDGE. *Affirmed.*

A. J. Sawyer and A. J. Shafer, for appellant.

James I. Rhea, *contra*.

OLDHAM, C.

This was an action in replevin. The facts underlying the controversy are that in the spring of 1903 defendant Bragg purchased from the plaintiff a threshing engine, and made a payment on his contract of purchase by turning over to the company an old engine which he owned, and secured the remainder of the agreed price by executing notes in the gross sum of \$1,400, payable at various times, and secured by a chattel mortgage on the engine and also on certain live stock owned by the defendant.

Default being made in the payment of the notes, the company took into its possession the engine, and demanded possession of the horses and cattle described in the chattel mortgage, which was denied, and it thereupon instituted the case at bar. Defendant answered plaintiff's petition with a general denial, and also pleaded specifically breaches of the warranty contained in the written contract of purchase, and alleged a rescission of the contract because of such breaches. On issues thus joined there was a trial to the court and jury, and a verdict and judgment for the defendant. To reverse this judgment plaintiff has appealed to this court.

The written warranty, the breach of which was alleged and relied on by defendant as a ground for rescission of the contract, contained the following condition: "If operated by competent persons," and the contest of fact raged around the question as to whether the machine failed to operate successfully because of defects in the alignment and construction of the engine, or because of the want of skill in its management by defendant Bragg. On this question there was a sharp conflict in the testimony. The evidence offered by defendant, however, tended to show that he had worked around steam threshing engines and machines for 14 years, and that he had owned and operated a J. I. Case engine for six years before the purchase of the engine in dispute; that plaintiff's agent had conversed with him as to his experience in managing threshing engines before the purchase, and knew, not only from defendant himself, but also from general inquiry, as to the extent of defendant's experience and his success in handling threshing engines before the contract was made. Under this state of the record we cannot, as urged by appellant, say that, as a matter of law, there is not sufficient evidence in the record to show that the engine was operated by competent persons. The evidence offered by the defendant tended to show that the engine did not work well from the start; that it wore heavily on the gearing and made a jarring noise, as if it

were not in correct alignment, and that on passing over soft and muddy ground the gearing broke under the strain. The evidence also shows that he made timely complaint, in substantial compliance with the terms of the warranty, of the failure of the engine to work properly, and that plaintiff's agent responded to the complaint, and attempted to adjust the alignment of the engine and put it in proper working order, but that, on a subsequent trial, it failed to work satisfactorily, and plaintiff's agent responded to a second complaint and again attempted to, or, as claimed by the plaintiff, did put the engine in proper working order. This claim, however, is denied by the defendant. It also shows that on a third notice, contained in two registered letters directed to the company at Lincoln, Nebraska, the plaintiff refused to make further repairs on the engine, and that, on the receipt of such refusal, defendant notified plaintiff that he had rescinded the contract and that the engine was at its disposal. Plaintiff objected to the evidence of the notification by registered letter directed to Lincoln, Nebraska, because the contract required notice to be given by registered letter to the general office of the company at Des Moines, Iowa. We think this objection is untenable, in view of the fact that plaintiff actually received the notices and answered them, and in its answer refused to further repair the engine, for the alleged reason that the engine was in proper condition and that the only fault was in its management by defendant. Objection is also urged against the action of the trial court in permitting the defendant to express his opinion on the merits of the engine because, it is alleged, there is no evidence tending to show that he had expert knowledge of the operation of an engine. We think the evidence already set out, as to defendant's experience in managing a threshing engine, was sufficient to qualify him to give his opinion, for whatever it was worth, on the alignment of the engine.

The six instructions given by the court on its own mo-

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tion are objected to in a group, without any words tending to separate them. Consequently, under the well established rule of this court, we need only examine the first one, which properly stated plaintiff's cause of action, to overrule this objection. The only real question in issue here is as to the sufficiency of the evidence to support the verdict. We have examined the record carefully, and are satisfied that it contains competent testimony tending to establish defendant's claim.

We therefore recommend that the judgment of the trial court be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOSEPH RUSHO, APPELLANT, v. CHARLES U. RICHARDSON
ET AL., APPELLEES.

FILED OCTOBER 18, 1906. No. 14,458.

1. Pleading: AMENDMENT. Action of the trial court in permitting amendment of the pleadings during the progress of the trial examined, and *held* not prejudicial.
2. Evidence examined, and *held* sufficient to sustain the judgment of the trial court.

APPEAL from the district court for Custer county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

A. S. Moon, A. R. Humphrey and E. J. Clements, for
appellant.

Beall & Shinn and H. M. Sullivan, *contra.*

OLDHAM, C.

This is an action in replevin. The facts underlying the controversy are that on the 2d day of July, 1904, a

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judgment was rendered in the district court for Custer county, Nebraska, in favor of Tolef Olsen and against one Gustave W. Wilde in the sum of \$2,500, and costs; that at the time of the rendition of this judgment Wilde was the owner of a stock of general merchandise in the village of Sargent in Custer county, Nebraska. On the 8th day of July, 1904, Wilde sold his stock of merchandise for \$1,250 in cash to Joseph Rusho, who is the plaintiff in this action. On the 11th day of July, 1904, an execution was issued on the judgment in favor of Olsen and against Wilde, and placed in the hands of the defendant sheriff, who, by his deputy, levied the execution on the stock of goods in Sargent, formerly owned by Wilde, and then in possession of plaintiff Rusho. When the goods were seized on this execution, Rusho replevied them from the sheriff and his deputy. There was a trial to the court and jury, and a verdict and judgment for the defendant. To reverse this judgment plaintiff has appealed to this court.

When the petition was filed, defendants answered, denying "the material allegations in the plaintiff's petition," and also specifically denying in numerous allegations plaintiff's ownership. As the pleading then stood, it was defectively drawn, but amounted to an amplified general denial. After the trial of the cause had begun, the court, over plaintiff's objections, permitted defendants to file a general denial, coupled with specific allegations of fraud in the alleged purchase of the stock of goods by plaintiff from Wilde. The action of the trial court in permitting this amendment, and in overruling the plaintiff's motion for a continuance on the ground of surprise, is alleged against as error in the appellant's brief. The defective answer first filed had not been attacked either by motion or demurrer, and in a replevin action, under a general denial, fraud in the purchase of the goods by plaintiff may be shown without being specifically pleaded. The answer first filed was sufficient to inform plaintiff that defendants relied on a general denial, even though it was defectively pleaded. When the court permitted the defense

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of a general denial to be properly pleaded, there was nothing in this action, standing alone, to show so much of surprise to the plaintiff as would warrant us in holding, in the absence of any other showing, that the court acted arbitrarily, and in violation of the sound discretion reposed in it, in refusing plaintiff's request for a continuance because of this alleged change in the issues.

It is next urged that the evidence is not sufficient to sustain the judgment. The evidence shows that plaintiff Rusho was engaged in the mercantile business in the village of Taylor, about 11 miles distant from Sargent; that he was not acquainted with Wilde until the day he made the purchase of the stock of goods in controversy; that plaintiff's son, the day before the purchase, advised his father to go over to Sargent and buy the goods from Wilde; that plaintiff took \$1,250 in money with him and went over to Sargent, arriving there about 10 o'clock in the morning, July 8, 1904; that after arriving at Sargent and looking over the stock of goods, he offered Wilde \$1,250 for it, without taking any invoice, and then telephoned to Mr. Moon, his attorney at Taylor, to come to Sargent and prepare a bill of sale for them. Mr. Moon arrived about 2 o'clock in the afternoon, and drew up a bill of sale for the entire stock of goods, which was delivered to Rusho, and Rusho had the \$1,250 counted and delivered to Wilde in the presence of Mr. Moon and the railroad station agent, who had been called in to witness the purchase. The evidence shows that at the time of the transaction Wilde was insolvent, and that Rusho knew of the judgment against Wilde in the district court, but says that he did not know how much the judgment was. After receiving the bill of sale from Wilde, there is evidence that Rusho advised Wilde to get out of the country as quickly as possible and to go to the Rocky Mountains, and that, acting on this suggestion, Wilde went out into the country, and stayed all night at a farm house, and took the train next day for Bonesteel, South Dakota. There is also evidence that as soon as Rusho got posses-

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sion of the stock of goods he began to dispose of them in job lots and prepare to take what was left over to Taylor. There is evidence tending to show that the stock of goods was actually worth between \$2,500 and \$3,000.

Under all these facts and circumstances connected with the purchase of the goods, we think the evidence is sufficient to sustain the verdict of the jury, which found, in substance, that the transaction was entered into by the plaintiff with full knowledge of the fraudulent intent of Wilde in making the transfer. As these are the only alleged errors pointed out in the brief, we recommend that the judgment of the trial court be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WILLIAM WEATHERINGTON, APPELLANT, V. ARTHUR B.
SMITH ET AL., APPELLEES.*

FILED OCTOBER 18, 1906. No. 14,590.

1. **Homestead: CONVEYANCE.** Section 4, ch. 36, Comp. St., provides that the homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife.
2. **Estoppel** will not supply the want of power, or make valid an act prohibited by express provision of law. *Whitlock v. Gosson*, 35 Neb. 829, followed and approved.
3. **Homestead: ABANDONMENT.** A departure from the homestead for pleasure, business or health, does not constitute an abandonment thereof. *Blumer v. Albright*, 64 Neb. 249, followed and approved.
4. ———: ———. Neither spouse can abandon the homestead for the other without his or her free consent.

*Rehearing allowed. See opinion, p. 369, *post*.

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5. **Vendor and Purchaser: BONA FIDES.** If a party relies upon a record to establish his title to realty and to relieve him of knowledge of secret liens known to his grantor, the record itself must show a chain of conveyances which discloses a perfect title in the grantor.

APPEAL from the district court for Harlan county: ED L. ADAMS, JUDGE. *Affirmed.*

Flansburg & Williams, for appellant.

R. L. Keester, J. G. Thompson, Henry W. Pennock and *J. E. Kelby*, contra.

OLDHAM, C.

This was an action to quiet title in a quarter section of land situated in Harlan county, Nebraska. There is no disputed fact in the record. Everything that is essential to the determination of the cause is either admitted in the pleadings or was testified to, without contradiction, at the trial in the court below. The facts established by the record are that plaintiff, William Weatherington, homesteaded the land in controversy in the year 1883, and resided thereon with his wife and minor children; that later in the same year, for the purpose of transferring the legal title from himself to his wife, he conveyed the premises to one Flansburg for the express consideration of \$600, and Flansburg, as a part of the same transaction, reconveyed the premises to the wife, Mrs. Eliza Weatherington; that in 1890 Mrs. Weatherington and her husband executed a mortgage on the premises to secure a loan of \$770, due five years after date; that they continued to live with their family on the premises until 1891, when plaintiff Weatherington was adjudged insane by the board of insanity of Harlan county and committed to the asylum at Lincoln, where he remained until 1894, when he was transferred to the asylum at Hastings, where he was confined and treated until July, 1904, when he was adjudged sane and restored to his liberty;

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that after the incarceration of Weatherington in the asylum his wife and family continued to reside on the homestead until 1894, when they removed to their friends and relatives in the state of Illinois, without any intention of returning to Nebraska, but with the intention of establishing a domicile in Illinois; that on the 10th day of October, 1896, Mrs. Weatherington, while residing in Illinois, made a warranty deed of the premises, subject to the mortgage and taxes then due, to Albert Cross and Alexander Johnston, for a consideration of \$500, which was a fair and reasonable consideration for the lands. This deed contained the following stipulation and recital: "Hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this state, with the exception of the crops now on said land, which I hereby reserve. (Signed) Mrs. Eliza Weatherington." This deed was acknowledged before a notary public of Hancock county, Illinois, but neither in the deed nor in the acknowledgment thereof is Mrs. Weatherington referred to as being single or unmarried. The record also shows that Cross and Johnston had knowledge of the fact that plaintiff, Weatherington, was an inmate of the insane asylum at the time they received this conveyance; that they entered into possession of the premises under this conveyance, paid off and discharged the mortgage thereon, and later, in 1899, for a fair and valuable consideration conveyed the premises by warranty deed to defendant Smith, who had no actual knowledge of Weatherington's rights, but took the land relying on the record title thereof.

After plaintiff Weatherington had been discharged from the asylum he was taken to his family in Illinois, but did no act indicating an adoption of the Illinois residence as his home. He went from there to the state of Ohio to transact some business, and then returned to Nebraska, and on the 1st day of December, 1904, instituted the case at bar, in which he asked to have the title to the land quieted in himself, and the deed from himself and wife to

Flansburg, and the deed from Flansburg to Mrs. Weatherington, and the deed from Mrs. Weatherington to Cross and Johnston, and the deed from Cross and Johnston to defendant Smith, canceled and held for naught, and for an accounting for the rents and profits of the premises. At the close of the testimony the court entered a decree canceling the deed from Mrs. Weatherington to Cross and Johnston, and the deed from Cross and Johnston to defendant Smith, and rendered an accounting, in which defendant Smith was credited with the mortgage debt, and interest and taxes paid, and improvements made upon the land, and charged with the rents and profits actually received from the land. The decree quieted the title to the premises in Eliza Weatherington, subject to the homestead right of the plaintiff, and subject to the remainder due on the mortgage debt after deducting the rents and profits. From this decree defendant Smith has appealed to this court, and plaintiff Weatherington has filed a cross-appeal, in which he complains of the action of the trial court in refusing to cancel all the deeds alleged against and quiet the title to the premises in him.

Section 4, ch. 36, Comp. St. 1903, provides: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." The requirements of this section of the statute have been strictly adhered to in a long line of decisions in this court. See *Aultman & Taylor Co. v. Jenkins*, 19 Neb. 209; *Swift v. Dewey*, 20 Neb. 107; *Larson v. Butts*, 22 Neb. 370; *Whitlock v. Gosson*, 35 Neb. 829; *Giles v. Miller*, 36 Neb. 346; *Clarke v. Koenig*, 36 Neb. 572; *Violet v. Rose*, 39 Neb. 660; *Havemeyer v. Dahn*, 48 Neb. 536; *Teske v. Dittberner*, 63 Neb. 607. The appellant Smith, while conceding the trend of these decisions, contends that, as he was a purchaser for value from his grantors, who were then in possession of the land, and as he had no actual knowledge of the state of the title, other than such as the record disclosed, he took

the land free from the secret equities existing between his grantors and the plaintiff. In other words, his contention is that the record of title, on which he relied at the time of his purchase, estops the plaintiff from asserting his homestead right as against this defendant. In *Whitlock v. Gosson, supra*, POST, J., speaking for the court said:

"Estoppel will not supply the want of power, or make valid an act prohibited by express provisions of law. The statute in effect declares a conveyance or incumbrance of the family homestead by the husband alone void not only as to the wife, but also as to the husband himself. Therefore neither is estopped from asserting the homestead right as against the grantee or mortgagee."

In *Blumer v. Albright*, 64 Neb. 249, it is held that a departure from the homestead for pleasure, business or health, does not constitute an abandonment thereof, and that neither spouse can abandon for the other without his, or her, free consent. In the still later case of *Palmer v. Sawyer*, 74 Neb. 108, it is held that, where a homestead right once exists, the person entitled to it cannot be divested thereof by any act or influence beyond his own volition.

Now, while it is clear from the evidence that Mrs. Weatherington departed from Nebraska with the intention of abandoning her homestead, and had such intention at the time she executed the deed to Cross and Johnston, it is equally clear that plaintiff Weatherington, at the time of the execution of such deed, was merely absent from the homestead for treatment for his mental disorder, without the legal capacity to contemplate an abandonment of his homestead right. As the wife could not abandon for the husband without his consent, his right remained unimpaired by her attempted change of domicile. Again, if we should concede that an estoppel by record could be invoked to defeat the homestead right of either spouse under the law of this state, it is a rule universally recognized that, if a party relies upon a record to establish his title to realty and to relieve him of

knowledge of secret liens known to his grantor, the record itself must show a chain of conveyances which discloses a perfect title in the grantor. Now, the record in this case showed, first, a patent from the general government to plaintiff Weatherington; second, a conveyance by Weatherington and his wife to Flansburg; third, a conveyance from Flansburg to Eliza Weatherington; fourth, a mortgage signed by Eliza Weatherington and plaintiff, as her husband; fifth, a deed from Eliza Weatherington to Cross and Johnston, executed in Illinois, in which she did not describe herself as being single or unmarried. This chain of title would, we think, have warned a prudent man relying upon it that Mrs. Weatherington had a living husband at the time of the conveyance made to her in 1883, and that this husband was still alive when the mortgage was executed in the year 1890, or six years before her conveyance to Cross and Johnston, which she executed as Mrs. Eliza Weatherington, without claiming to be single or unmarried. It seems to us that prudence would have suggested to one relying on this record an inquiry concerning the whereabouts of Mrs. Weatherington's husband before making a purchase of the premises. We therefore conclude that the plaintiff's homestead right in the premises, never having been abandoned or waived by himself, remains intact and unaffected by the attempted abandonment by his wife and the record of the conveyance made by her.

As there is no complaint concerning the items contained in the accounting by either of the litigants, this disposes of the appellant's case; and with reference to the plaintiff's complaint in his cross-appeal, it is sufficient to say that the evidence clearly shows that he was in full possession of his mental powers at the time he conveyed the legal title to the land through a conduit to his wife. While, in fact, no consideration passed for this conveyance, it was made for the express purpose of vesting the legal estate in the wife, and as her deed to Cross and Johnston was absolutely void, neither she nor the plaintiff can be estopped by it.

We therefore recommend that the judgment of the district court be affirmed.

AMES, C., concurs.

EPPELSON, C., dissents.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed June 7, 1907. *Judgment of affirmance adhered to:*

Homestead: ABANDONMENT: CONVEYANCE. Neither the husband nor the wife can abandon the family homestead and thereafter sell and convey the same to another to the exclusion of the homestead right of an insane spouse.

BARNES, J.

Our former opinion, *ante*, p. 363, fully states the facts in controversy in this case. We were urged on the rehearing to reverse our former judgment, and establish the rule that under our homestead law, where the wife becomes the head of the family by reason of the insanity of the husband, she may abandon the homestead, change the domicile, and convey the homestead to a purchaser without the knowledge or consent of the husband. Section 4, ch. 36, Comp. St. 1905, provides: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." It has ever been the policy of this court to strictly adhere to the letter and spirit of this statute. Speaking of this act the court said, in *Whitlock v. Gosson*, 35 Neb. 829:

"Here is a plain prohibition against the incumbrance of the homestead without the joint act of both husband and wife. It contains no exception with respect to an absent or insane husband or wife."

And it was held in that case that Mrs. Gosson, who was

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confined in an asylum for the insane at Kankakee, in the state of Illinois, and had never been a resident of the state of Nebraska, was entitled to an interest in the husband's homestead, which he could neither incumber nor convey.

In *Palmer v. Sawyer*, 74 Neb. 108, it was said: "A homestead is a parcel of land on which the family resides, and which is to them a home. It is constituted by the two acts of selection and residence, in compliance with the terms of the law conferring it. When these things exist *bona fide*, the essential elements of the homestead right exist, of which the persons entitled to it cannot be divested by acts or influences beyond their volition."

In the case of *Way v. Scott*, 118 Ia. 197, the plaintiff claimed title to the premises in question by virtue of a sheriff's deed based upon a mortgage executed by one Scott, the owner of the homestead, and in the execution of which Ann Scott, his wife, did not join. At the time the mortgage was executed, the wife was confined in an insane asylum. The court said:

"We think the evidence clearly shows an abandonment of the homestead by the father, but the wife was entitled to the same right therein until it was cut off by proper proceedings, and the fact that she was then in an insane asylum would not deprive her of this right."

The authorities seem to be unanimous that the insanity of one spouse does not withdraw him or her from the protection of the homestead law, and a conveyance of the homestead, and a conveyance by the other is void.

We are asked, however, to hold that the domicile of an insane husband may be changed by the wife from one state to another, without his knowledge or consent and without his bodily removal. The courts have been very reluctant to assent to involuntary changes of the domicile of minors, or of persons *non compos mentis*, and yet this rule would put it in the power of any woman, if her husband should be so unfortunate as to become insane, to sell the home, which he may have acquired by years of toil, against his will, remove him from the state of his domicile and require

him to spend his life among strangers in such place as she might select. If this is the law, the misfortune of the husband, or wife, as the case may be, would become the means of perpetrating a grave wrong and injustice upon such unfortunate. We are inclined to think that a greater evil is liable to result from a weakening of the barriers against the alienation of the home by the homestead act than could accrue to purchasers of real estate who have not sufficiently investigated the title thereto before their purchase. Indeed, such a rule would furnish an ingenious and convenient method of avoiding the effect of the homestead act, and would enable a husband, or a wife, to deprive an insane spouse of valuable property rights. We do not think a case can be found which supports the rule which we are asked to establish. It is said in *Dorrington v. Myers*, 11 Neb. 388:

"Neither the death of the wife, nor her abandonment of her husband, nor the arrival at full age and departure from the parental roof of all the sons and daughters, would have the effect of dismantling the homestead of the protection of the exemption law."

In the case at bar the wife apparently abandoned the husband, for she left him in the insane asylum and departed from the state of his residence. As was said in *Palmer v. Sawyer*, *supra*:

"When a homestead has been selected by the head of a family, he becomes invested with a right or an estate in said homestead, which cannot be defeated by the death or abandonment of the home by other members of the family who occupy it at the time of its selection."

While it is possible that the homestead in question would have been lost by a foreclosure of the mortgage, which had been given thereon by both the husband and wife, if Mrs. Weatherington had not sold it, yet that contingency should not influence us in our decision of this question. If such an event had happened it would have been the result of the voluntary action of both husband and wife, and a failure to realize a sufficient sum from

the foreclosure sale, over and above the mortgage and taxes, to afford them their homestead exemption would have been one of the usual incidents connected with the fluctuations of property values. Again, it appears, that at the time Mrs. Weatherington sold the homestead to Cross and Johnston, and when they sold it to Smith, she had acquired no other homestead, and there is no evidence that she then had any such intention. So the only homestead Weatherington could assert any right to was the original one, which he had selected and established upon the land in question.

For the foregoing reasons, we are of opinion that our former judgment is right, and it is therefore adhered to.

AFFIRMED.

SEDGWICK, C. J., dissenting.

The facts in this case are not in dispute. They are quite fully stated in the former opinion, *ante*, p. 363. It appears that for about three years after Mr. Weatherington became insane Mrs. Weatherington maintained herself and children upon the homestead, when she removed the family therefrom, and went to the state of Illinois and established a home there, without any intention of returning to the premises in question. The fourth paragraph of the syllabus of the former opinion is:

“Neither spouse can abandon the homestead for the other without his, or her, free consent.”

This is the principal proposition discussed in the former opinion, and in its support two cases are cited: *Blumer v. Albright*, 64 Neb. 249; *Palmer v. Sawyer*, 74 Neb. 108. The provision of the statute that “the homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife” (Comp. St. ch. 36, sec. 4) is quoted in the opinion, and many of the numerous decisions of his court enforcing that provision of the statute are cited. This language of

the statute is plain and unambiguous, and there is no doubt that it has been correctly construed and applied in the decisions cited. If, then, this was the homestead of the parties at the time that Mrs. Weatherington conveyed it to Cross and Johnston, there is no doubt that the statute quoted applies, and if neither party can under any circumstances abandon the homestead for the other, then these premises having been the homestead of Mr. Weatherington must continue to be so until voluntarily abandoned by him or conveyed by the joint deed of husband and wife. The record shows that in 1894, after Mr. Weatherington had been in the asylum at Lincoln for about three years, he was considered incurably insane and was for that reason transferred to the asylum at Hastings. Thereupon Mrs. Weatherington, finding herself alone with her family of young children, the season at that time being unfavorable and the farm unproductive, and she being unable to maintain the family in the homestead, attempted to abandon the homestead and establish another home. Two years after she had taken this action, the mortgage and taxes being due upon the land, she faced the alternative of either selling the land for its fair value, subject to the mortgage, or losing it altogether. She held the legal title in the land. It is not necessary to consider whether she had paid Mr. Weatherington a consideration therefor. The transfer of title from him to her through an intermediary, whether a sale or gift, would leave Mr. Weatherington no interest in the land, except such as he at that time had under the homestead law.

The object of the homestead law is to preserve a home for the family. Its humane purposes are for the benefit of the children, as well as for the head of the family. It may be abandoned or conveyed without the consent of the minor members of the family, because their very helplessness renders them incompetent to judge of their own best interest, and not because the law is less tender of their rights or their welfare than it is of the homestead

right of the spouse of the owner of the legal title. To accomplish its beneficent purposes it has been uniformly held that the homestead law must be liberally construed. That construction must be adopted, if possible, which will preserve the home. When it becomes manifest that through unfortunate circumstances the home must be abandoned or entirely lost to the family, common prudence dictates that so much of its value be saved as possible and invested in a new home. There is a provision of the statute which is of great importance in view of such conditions. The proceeds of a sale of the homestead retain the homestead character until, within a specified time, a new home may be obtained. The misfortune which drove Mr. Weatherington away from his home was one of the very many misfortunes which compelled the entire family to abandon it. There is no doubt that the head of a family may under such circumstances choose another home, and that it is the duty of all the members of the family to acquiesce in that choice. Under the homestead law the husband is generally considered the head of the family. If he, for good reason, deems it best to abandon the homestead for another, and the wife is dissatisfied and determined to retain her homestead right, it would no doubt be necessary for her to take some measures to declare such intention. If she remained in the home her intention would be manifest, but if she voluntarily left the home, although she did not accompany the family to the new home, the presumption would exist that she had abandoned the home also; if she was incompetent to exercise any volition in the matter, and it was plainly in her interest, she might be removed with the family, and the abandonment of the homestead would be complete. If "neither husband nor wife can abandon the family homestead, and thereafter sell and convey the same to another to the exclusion of the homestead right of an insane spouse," as the syllabus of the present opinion states, then, in all cases where the homestead is abandoned by the family and afterwards conveyed by the

spouse in whose name the legal title is held, it will be necessary to inquire whether the other spouse was sane at the time, and so competent to voluntarily abandon the homestead. In *Blumer v. Albright, supra*, the husband and wife with their two children left the homestead, where they resided, to go to another town to enable the husband to enter into a business for a term of years. They procured no other home, and the question was whether they had abandoned their homestead. It appeared that the wife had at all times refused to abandon the homestead, had continually declared that she reserved it as her home and expected to return. The husband was so far incapacitated by excessive drink and bad habits that it was at least doubtful whether, as against the interests of the home, he should be regarded as the head of the family, and it was decided that there was no abandonment of the homestead on the part of the wife. In *Palmer v. Sawyer, supra*, the wife was deceased, and the husband with three minor children occupied the premises claimed as a homestead. Afterwards one of the children died, and the other two having arrived at majority, left the home, leaving their father alone in possession and occupancy of the homestead. The question was whether his right of homestead had been extinguished by the fact of his family leaving him, and it was decided that he still retained his homestead right in the property. The language used in these opinions, and relied upon in the former opinion in this case, was perhaps correct in the sense in which it was used in those opinions, but it has no application, and was not intended to have application, to circumstances such as are involved in this case.

The husband is not always the head of the family. "A head of a family is one who controls, supervises, and manages the affairs about the house." 21 Cyc. 467. A married woman on whom a family is dependent for maintenance is the head of the family, the husband being an invalid. *Schaller v. Kurtz*, 25 Neb. 655. And in *State v. Houck*, 32 Neb. 525, where the husband was a cripple,

and unable to work, and contributed nothing for the support of the family, which was supported entirely by the wife, she was held to be the head of the family within the meaning of the exemption laws, and, so, where a husband had been insane and had recovered from the insanity so far as to live at home with his wife and family, but did nothing toward his own support or that of the family, and the wife with the help of the children carried on the farm on which they lived, she was held to be the head of the family and entitled to the exemptions allowed by statute. *Temple v. Freed*, 21 Ill. App. 238.

In *McKnight v. Dudley*, 148 Fed. 204, the circuit court of appeals of the sixth circuit said: "It is true the husband is designated as the head of the family and given the right to choose a reasonable place of abode, but, of course, this right exists only while he is sane. When he was placed in the asylum, his wife became the head of the family, the burden of support fell upon her and the right to choose a place of abode went with it."

A liberal construction of our statutes for the purpose of preserving the home will consider the wife, who is supporting herself and her minor children, as the head of the family when for any reason the husband is entirely incapacitated to take that position. The head of a family whose spouse is utterly incapacitated may change the domicile of the family when circumstances beyond her control compel such action. When Mrs. Weatherington removed the family to Illinois, she changed the domicile of the family. Her husband had been incapacitated for three years. It was believed by those most capable of judging that he would never be competent to act rationally for himself or for the family. When the homestead had been abandoned for two years, and a new home was being procured, she sold her farm and made her home in Illinois for nearly ten years longer, before any question was raised as to her right to abandon the homestead. Five years after the farm was abandoned as a homestead this plaintiff bought it in good faith, for full value, and

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without notice of any latent claims. The title so purchased ought to be protected.

There are other important matters involved in the case which seem to demand a reversal of the judgment, and I cannot concur in disregarding them.

WILLIAM PRANTE, GUARDIAN, v. OSCAR LOMPE, GUARDIAN.

FILED OCTOBER 18, 1906. No. 14,298.

1. **Insane Persons: GUARDIAN, APPOINTMENT OF: PARTIES.** In a proceeding on a petition for the appointment of a guardian for an alleged feeble-minded person, his next of kin are proper parties and may appear in court and oppose the granting of the petition.
2. **Trial: WAIVER.** It is error for the county court to hear a petition for the appointment of a guardian for an alleged feeble-minded person prior to the hour set for the hearing upon the stipulation of such feeble-minded person acting without counsel, waiving the time of hearing.
3. **Probate Court: APPEAL: PROCEDURE.** Where a judgment of a county court is reversed by a district court in a proceeding in error, the district court may retain such cause for trial. This rule applies to matters of probate jurisdiction as well as to civil actions.

ERROR to the district court for Nemaha county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

H. A. Lambert and C. O. French, for plaintiff in error.

E. Ferneau, Stull & Hawaby and W. F. Buck, contra.

EPPERSON, C.

On January 10, 1905, William Prante filed a petition in the county court of Nemaha county, alleging that Harmon Ray is a resident of that county, and is possessed of personal property of the value of \$10,000 and the owner of real estate of the value of \$100,000; that the mental powers of the said Ray have been failing for some time;

and on account of mental disease and mental delusions he has become mentally incompetent to have the charge and management of his property; that said Ray has two children, aged respectively 14 and 8 years, and residents of Thayer county, Nebraska. The petition concludes with a prayer that a time may be fixed for hearing of said petition; that notice of its pendency be given to said Ray and his minor children, as required by law, and that on the hearing thereof A. M. Engles and John McConnell should be appointed guardians. The county court fixed January 27, 1905, for the hearing of said petition, and made an order requiring a notice thereof to be served upon said Ray and his children. On the day fixed for hearing, Ray appeared with his counsel and asked that the case be continued. This request was granted, and the hearing adjourned until February 28, at 10 A. M. On February 28, at 45 minutes after 8 o'clock in the forenoon, Ray and the petitioner, Prante, appeared and asked that the petition be immediately heard. Ray stated in open court that he wished the litigation to cease; that he wanted a guardian appointed, and requested the appointment of Prante, and did not wish to await the arrival of his attorneys or to be represented by them. The court thereupon proceeded with the hearing; found for the petitioner, and appointed William Prante guardian. As shown by the record, the hearing was had and the judgment announced appointing a guardian to take charge of more than \$100,000 worth of property, depriving the alleged incompetent person of his liberty to the extent of placing him under guardianship, all within the short space of 25 minutes. At 10 minutes after 9 A. M., J. S. Stull came into court and filed an answer, sworn to by Ray on the preceding day, and W. F. Buck came also and said that he was attorney for Oscar Lompe, the guardian of Ray's children, filed an answer in behalf of said children and their guardian, asked that the cause be opened, the judgment set aside, and the case retried. This request, on the objection of both Ray and Prante,

was refused. Lompe then prepared and filed a formal motion asking that the findings and judgment of the court be set aside for irregularities in the proceedings, among other things alleging that the hearing was had in the absence of Lompe's and Ray's attorneys; that it was heard prior to the hour previously fixed, and that Ray had been wrongfully induced to consent to Prante's appointment. The court overruled the motion, and Lompe prosecuted error proceedings in the district court to reverse the judgment of the county court. Upon the hearing there, the district court found that the county court erred in hearing the case prior to the hour fixed and in refusing to hear the case on its merits on the request of Lompe. A judgment of reversal was entered, and the district court further ordered that the cause be retained for further proceedings. The petitioner, Prante, prosecutes error to this court.

Prante contends that the district court erred in reversing the judgment of the county court; that neither Ray's children nor their guardian were necessary parties to the proceedings in the county court and have no right to complain; that by the service of notice upon the alleged incompetent person the court acquired jurisdiction under the provisions of section 5384, Ann. St., and that therefore the court was not required to await the arrival of the hour appointed for the hearing to permit the next of kin to appear. Section 5384, *supra*, provides only for service of notice upon the alleged incompetent person. Under a very similar statute of Michigan the supreme court of that state has held that the petition for the appointment of a guardian was insufficient if it fail to allege the names of the next of kin (*In re Bassett*, 68 Mich. 348); and, further, that the next of kin were necessary parties, and that notice to them was indispensable to the court's jurisdiction (*In re Meyers*, 73 Mich. 401). Our statute nowhere expressly provides that notice shall be given to the next of kin, nor does it provide that the petition for the appointment shall be signed

by the next of kin. The court may be given jurisdiction of the subject matter upon a petition filed by a friend of the alleged incompetent person. We do not consider it necessary in the case at bar to determine whether or not under the provisions of the statutes of this state it is necessary to give notice of the proceedings to the next of kin. The county court has general jurisdiction in matters pertaining to guardianship, and it is its duty to protect the interests of the alleged incompetent person, and, further, to see to it that all proceedings in which the alleged feeble-minded person is interested are regular in every respect. Incident to this general jurisdiction, it is within the power of the court, even though it may not be required by statute, to give notice to the next of kin of the alleged incompetent person, that they may appear and protect his rights. Especially should this be done when the petition is filed by one other than the next of kin.

In the case at bar the county court, in the wise exercise of his discretion, directed a notice to be served on Ray's children, who were his next of kin. They were parties to the proceeding, and had a right to rely upon the order of the court adjourning the hearing to a subsequent day, and, further, had a right to appear and make a showing at the hour fixed for the hearing. It would be an absurdity to say that the next of kin have no interest in the proceedings and that they should be denied the privilege of appearing in behalf of their kindred. Ray's children were heirs apparent, and as such had an interest which would entitle them to appear and be heard. The court was required to determine not only Ray's incapacity to care for his own property, but must also determine whether he was a resident of the county and whether the proposed guardian is a suitable person. These issues were tendered in Lompe's answer. No one, other than the insane person himself, who must be considered incapable of acting for himself, is more interested in all these questions than the next of kin. They are interested, not only as heirs apparent, but also from a humanitarian standpoint, in

seeing that their unfortunate kinsman is put under the control of one who will diligently look after his property and interests. On account of incomplete legislation regarding procedure in such cases, the responsibility of the courts is great, and it is their duty to hear, not only the petitions filed by the next of kin, but also objections made by such relatives in good faith for the benefit of the ward, or for the conservation of his property. An alleged feeble-minded person may himself employ counsel and oppose the application for the appointment of a guardian, and, when he does so, should be heard by the court. But an incompetent person can no more stipulate away his statutory rights for a hearing, nor waive jurisdictional rights, than he could execute a binding contract. An adjudication of incompetency made by the court prior to the hour fixed for the hearing, and so heard upon the stipulation of the incompetent person acting without counsel, is an irregularity patent on the face of the record, and of this irregularity the next of kin, or their guardian, may complain.

Plaintiff further contends that the district court, upon finding reversible error in the judgment of the county court, should have remanded the case to the lower court instead of holding the cause for trial *de novo*. Where the entire case is taken to the appellate court, as it is in the statutory proceedings of appeal from a judgment adjudging one insane, there can be no doubt but that the appellate court acquires jurisdiction under the provisions of section 4823, Ann. St., to try the case *de novo*. The same course is proper upon reversal of a judgment of the county court in error proceedings. *Maryott & McHurron v. Gardner*, 50 Neb. 320. It is a rule of practice established in this state that the district court shall, upon the reversal of a judgment of the county court, hold the case for trial upon the merits. Such is not an exercise of original jurisdiction. In *Ribble v. Furmin*, 69 Neb. 38, it is said in the opinion by POUND, C.:

"The legislature evidently intended that causes should

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be settled finally in the district court when taken there by appeal or error and that parties should not be compelled to go back and forth from the lower to the higher tribunal in matters involving small sums as is so often the case in the more important causes brought in the district court and reviewed in the supreme court."

It therefore follows that the judgment of the district court in reversing the judgment of the county court and holding the case for trial on the merits is right, and we recommend that it be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ERNEST H. TRACY ET AL., APPELLANTS, v. W. J. DEAN,
APPELLEE.

FILED OCTOBER 18, 1906. No. 14,434.

1. **Real Estate Agents: CONTRACTS.** To entitle a real estate broker to recover a commission for the sale of real estate he must prove a sale of the land on such terms as would entitle him to a commission under the provisions of a written contract between himself and the owner.
2. **Evidence.** Correspondence set out in the opinion held insufficient to entitle the plaintiff to recover a commission.

APPEAL from the district court for Madison county:
JOHN F. BOYD, JUDGE. *Affirmed.*

Mapes & Hazen, for appellants.

M. D. Tyler, contra.

EPPERSON, C.

Plaintiffs are real estate brokers, and brought this suit to recover a commission alleged to be due by reason

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of a sale of defendant's property, situate in the city of Norfolk. The case brought shows the following facts: On September 28, 1901, plaintiffs wrote defendant (Exhibit A) as follows: "Do you wish to sell your residence property in this city? If so, kindly name your lowest price for cash, also your price on time, and terms, both subject to a commission of 5 per cent. on the first thousand and 2½ per cent. on balance. If you will make the price right, we think we may be able to make a sale. An early reply will greatly oblige." On October 3, 1901, defendant replied (Exhibit B) as follows: "In reply to yours of Sept. 28, will say that my price on my Norfolk property is \$2,000. Will sell on time if satisfactory payment can be made, or will give you an option for 6 months at \$1,800 cash, meaning by this that I am to receive \$1,800 cash, you all above that you can get. Let me hear from you. It has been in hands of Lamont." On May 21, 1902, plaintiffs again wrote the defendant a letter (Exhibit C) regarding this property as follows: "We have been endeavoring all winter to effect a sale on your property at \$2,000, but, so far, have been unable to do so, as it is priced a little bit strong considering other properties which have been sold in town of about the same character. We have an offer now of \$1,250 cash and two vacant lots, 45 by 122 each, block one, Bear and Mathewson's addition to Norfolk, on 10th street facing east. These lots are in the block where Dan Koenigstein now lives, and two new houses costing about \$1,500 each have been built between his house and this property, which is the southeast corner of the block. The lots are probably worth \$600 to \$650. Kindly advise us whether you will consider proposition of this kind, allowing us a commission for the same, and greatly oblige." To this letter the defendant wrote and mailed, May 31, 1902, the following reply (Exhibit D): "It is impossible for me to form a correct judgment concerning the offer you have on my property without knowing more about the lots. I will be in Norfolk in a few days, and then if the offer

is still open it will not take me long to decide. If I find the lots are worth \$600, I will probably make the trade." Within a few days after the mailing of the letter last above set out, plaintiff visited Norfolk, and rented the property in question to one Hoffman. Later defendant conveyed his property to Hoffman, and received therefor \$1,300 in cash and the lots described in plaintiff's letter (Exhibit C). The deal was finally consummated through correspondence between defendant and Hoffman. While in Norfolk the defendant did not negotiate with plaintiffs, nor call upon them to render assistance in bringing about a sale. There is some conflict in the evidence as to whether the increase of \$50 in the cash payment was brought about through the efforts of the plaintiffs, but, as we view the case, it is immaterial.

Before the plaintiffs may recover they must show a written contract, subscribed by the parties, wherein is set forth the compensation to be allowed by the owner in case of a sale by the broker or agent. Ann. St. sec. 10258. The plaintiffs rely upon the correspondence above set out to show such a contract. At most, such correspondence amounted to an agreement to pay a commission in the event that the plaintiffs would sell the property for more than \$1,800 within six months from and after the date of defendant's first letter (Exhibit B). Even had the time therein limited been extended by parol agreement, plaintiffs have failed to show that they are entitled to a commission. The evidence does not disclose that the lots taken by the defendant as a part of the consideration for the sale of his property exceeded \$500 in value, and therefore, giving the correspondence the most liberal construction favorable to plaintiffs, they did not earn the commission under its terms.

The judgment of the district court was for the defendant, and we recommend that it be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MEADE PLUMBING, HEATING & LIGHTING COMPANY ET AL.,
APPELLANTS, V. JAMES M. IRWIN ET AL., APPELLEES.*

FILED OCTOBER 18, 1906. No. 14,336.

1. **Appeal: ESTOPPEL.** A party is not estopped to prosecute his appeal by the fact that he accepts the amount of a judgment which the appellee concedes to be due him; the appeal in such case involving only his right to a further recovery.
2. **Principal and Agent: LIABILITY OF AGENT.** An agent cannot be held liable on a contract made on behalf of his principal where the other contracting party knows of the relation and enters into the contract intending to hold the principal to its performance.
3. **Mechanics' Liens: CONTRACT.** The materialman, in order to be entitled to a mechanic's lien, must contract for the work and material with the owner or an agent of the owner authorized to make the improvement.
4. **Judgment: MODIFYING AFTER TERM.** The district court cannot, after the adjournment of the term at which a judgment is entered, amend the same by changing the award of costs to one of the parties, except for some reason mentioned in section 602 of the code as ground for vacating or modifying a judgment.
5. **Cross-Appeal.** Under our former practice a party might take a cross-appeal, after the filing of the transcript by the appellant, by filing a brief in due season assailing the decree so far as it affected his interest. In order to perfect his cross-appeal the brief should be filed in due season.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Reversed as to costs.*

Horace F. Bishop and Ricketts & Ricketts, for appellants.

Hall, Woods & Pound, contra.

* Rehearing allowed. See opinion, p. 391, *post*.

DUFFIE, C.

At the October, 1904, term of the district court for Lancaster county a decree was entered finding due the plaintiffs from the defendants James M. Irwin and Emma McGahey the sum of \$125 for work done and material furnished in the improvement of a building on lot 10 in block 98 in the city of Lincoln. A mechanic's lien for said amount was also foreclosed and the property ordered sold in satisfaction thereof, and for the costs of suit. Irwin is the owner of the property, and defended upon the ground that he had not ordered or authorized the making of the improvement for which the lien was claimed. Mrs. McGahey, who ordered the improvement, claimed that it was to be furnished at a cost not to exceed \$125, which amount she tendered in her answer, the plaintiffs' claim being for \$248.26. January 26, 1905, the plaintiffs procured an order of sale on this decree and placed the same in the hands of the sheriff, who returned the same on February 15 with the following indorsement: "Judgment having been paid into court this writ is herewith returned. Return 50c. Mileage 10c. Nicholas Ress, Sheriff." January 30, 1905, and after final adjournment of the October, 1904, term, which occurred January 7, 1905, the defendants filed a motion for an order taxing all the costs to the plaintiffs, for the reason that on the commencement of the action the defendants herein filed an answer tendering to the plaintiffs the sum of \$125, and that since recovery for that amount only had been had they should not be taxed with the costs. February 16, 1905, the court sustained the motion so far as to require the plaintiffs to pay one-half the costs of the suit, and thereupon the plaintiffs took an appeal to this court, and insist that they may not only have the order requiring them to pay one-half of the costs reviewed, but also the original decree; and the defendant Irwin claims, upon cross-appeal that the decree establishing a mechanic's lien against his property was erroneous,

and insists that we review and set aside the judgment of the district court in that regard.

The defendants insist that the plaintiffs cannot accept the benefit of the judgment in their behalf and at the same time appeal therefrom, while the plaintiffs contend that as the defendants did not controvert their claim to the extent of \$125, the amount for which judgment was given, they were entitled to accept that amount, and still appeal from the decree and obtain the opinion of this court upon its right to the remainder which it claims to be due. The same question was before this court in *Weston v. Falk*, 66 Neb. 198, and the present chief justice, who wrote the opinion on rehearing (66 Neb. 202), quoted with approval the language of the supreme court of North Dakota in *Tyler v. Shea*, 4 N. Dak. 377, as follows:

"The rule is well settled that one cannot accept or secure a benefit under a judgment, and then appeal from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute, and cannot possibly be affected by the reversal of the judgment. * * * It is the possibility that his appeal may lead to a result showing that he was not entitled to what he has received under the judgment appealed from that defeats his right to appeal. Where there is no such possibility, the right to appeal is unimpaired by the acceptance of benefits under the judgment appealed from. * * * The appellant waived his right to appeal if he obtained any benefit under the judgment which on the appeal may be taken from him."

Numerous authorities may be cited in support of this rule, among which are, *Reynes v. Dumont*, 130 U. S. 354; *Embry v. Palmer*, 107 U. S. 3; *United States v. Dashiell*, 70 U. S. 688; *Mellen v. Mellen*, 137 N. Y. 606, 33 N. E. 545. We hold, therefore, that taking out execution for the amount of the decree does not estop the appellant from appealing to this court.

Coming now to the merits of the plaintiff's claim, the evi-

dence is uncontradicted that what was called a proposition for plumbing work and material was published in the "Lincoln Journal" by the Meade Plumbing, Heating & Lighting Company. Mrs. McGahey saw the advertisement, and had several conversations with Mr. Meade, at that time a partner in the business. These conversations finally resulted in an agreement, by the terms of which the Meade Plumbing, Heating & Lighting Company was to furnish a bath room in the house, the price of the bath outfit, fixtures, labor, etc., being agreed upon, but the depth of sewerage, the number of hours of labor required to complete the job, and the exact amount of material required not being known to Mrs. McGahey, it was agreed that in no event should the cost of the improvement exceed the sum of \$125. Some time after the contract was made Mr. Wiltamuth, another member of the firm, took a copy of their so-called proposition to the home of Mrs. McGahey and procured her signature thereto. It is claimed that Mrs. McGahey was the agent of Irwin, and that this constitutes a valid and binding written contract between the parties, which cannot be impeached or modified by parol evidence tending to show that the price for the work and material should not exceed \$125. Conceding this to be true, still we think that the decree of the district court gave the plaintiffs more than they were entitled to under the pleadings and the evidence. In their petition it is alleged as follows: "Plaintiffs show to the court that at the time of furnishing said plumbing supplies and performing said skill and labor the fee title to said premises stood, and now stands, in the name of the defendant, James M. Irwin; that he had entrusted the sole care, management and control of said premises to the defendant Emma McGahey, with full power and authority to cause repairs to be made thereon, and that said contract so made between the defendant Emma McGahey and the said Meade Plumbing, Heating & Lighting Company was made by the authority of the

defendant James M. Irwin and was fully satisfied by him."

It is apparent that Mrs. McGahey is not personally liable upon a contract made by her as the agent of Irwin, and which plaintiffs insist she had full power to make. On the theory on which the case was brought and prosecuted, Mrs. McGahey was not liable to the plaintiff, and judgment should not have gone against her for any amount; and, this being so, the plaintiffs cannot complain that she was not held to pay a greater sum. The evidence is undisputed that Irwin, a resident of the state of Illinois, is the owner of the premises on which the lien is claimed. He is the brother of Mrs. McGahey, who has three daughters. In 1888 one of them was pursuing a course of study in the state university. The defendant Irwin, uncle of this girl, in order to assist her in completing her education, gave over to her the rents derived from this property. When she had completed her education, he made the same arrangements with respect to one of her sisters; and upon the graduation of the latter he gave Mrs. McGahey, his sister and codefendant, authority to collect the rents accruing from this property for the benefit of the youngest daughter. The last arrangement was in effect when the contract in question and the improvements made in pursuance of it were made, and is the extent of Mrs. McGahey's authority to act for her codefendant with respect to this property, save that for a portion of the time she had paid the taxes out of the rents derived from the property. Both she and Irwin deny that she had authority to contract for the repair or improvement of the property on his behalf, and that he had no notice or knowledge of the contract with the plaintiffs or of the improvements made in pursuance of it until after the improvements had been completed. The most that can be said of the evidence on this point is that Mrs. McGahey had the bare authority to collect the rents accruing from this property and pay them over to her daughter. It will not be claimed, we think, that such

authority carried with it implied authority to bind the owner by contracts for improvements. It is true, the improvements inure to the benefit of the owner of the fee, but the same may be said of improvements made by a tenant; but a tenant cannot subject the interest of his landlord in the premises to a mechanic's lien. *Waterman v. Stout*, 38 Neb. 396; *Moore v. Vaughn*, 42 Neb. 696; *Schrage v. Miller*, 44 Neb. 818. See also *Rust-Owen Lumber Co. v. Holt*, 60 Neb. 80. It follows, then, that the finding and judgment against Irwin was erroneous, but as we find nothing in the record showing a cross-appeal, and his brief assailing the decree was not filed in due season, he is not entitled to have the decree reviewed. *Goos v. Goos*, 57 Neb. 294.

The second ground of complaint by the appellants is that the district court had no jurisdiction to alter or amend the decree relating to costs after the term at which the decree was made. We have no doubt of the correctness of this position. Any mistake made by the clerk in taxing fees in favor of or against a party may be corrected by the court on motion at any time; but an award of costs in favor of a party is a part of the judgment as much as the award of damages, and this cannot be changed after the term, except for some statutory cause allowing the court to set aside or modify its judgment at a subsequent term. This question was before the supreme court of Iowa in *Fairbairn v. Dana*, 68 Ia. 231, where it was sought to modify a judgment awarding costs. The court said:

"It will be observed that the movers are not seeking relief against one or more items of costs which were erroneously or illegally taxed to them; but, in effect, they ask that the provision of the judgment which renders them liable for the costs be set aside and canceled. If a provision in a judgment for the recovery of costs by the successful party against his adversary is an adjudication of the legal rights of the parties, it is clear, we think, that the court has no power at a subsequent term to

modify or change it, except for one of the causes enumerated in section 3154 of the code as ground for vacating or modifying a judgment."

Section 3154 of the Iowa code, referred to in the above quotation, is in substance the same as section 602 of our code, relating to the vacation and modification of judgments after the term at which they were entered. In our opinion, the district court has no jurisdiction upon the showing made to modify the decree, so far as it awarded costs to the plaintiff, at a term subsequent to the rendition of the decree.

We recommend, therefore, that the order of the district court requiring the plaintiffs and appellants to pay one-half of the costs be reversed and that the cause be remanded, with directions to set aside such order and to execute the decree in favor of the plaintiffs for the taxable costs of the case, and that it stand affirmed as to all other matters.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the order of the district court requiring the plaintiffs and appellants to pay one-half of the costs is reversed and the cause remanded, with directions to set aside such order and execute the decree in favor of the plaintiffs for the taxable costs of the case, and that it stand affirmed as to all other matters.

JUDGMENT ACCORDINGLY.

The following opinion on rehearing was filed April 4, 1907. *Former judgment vacated and judgment of district court reversed with directions:*

1. **Cross-Appeal: FILING BRIEFS.** By our former practice governing appeals in equity cases one could prosecute a cross-appeal by filing his brief in due season assailing the decree appealed from.
2. ———: ———. Such a brief will be held to have been filed in due

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season where appellant neither objects to service and filing thereof, nor moves to have it stricken from the record as having been filed out of time.

BARNES, J.

The Meade Plumbing, Heating & Lighting Company et al. brought this action in the district court against James M. Irwin, his sister, Mrs. Emma McGahey, and others to recover the sum of \$248.26, and foreclose a mechanic's lien on a certain house and lot in the city of Lincoln, owned by said Irwin. A judgment was rendered in favor of the plaintiffs for the sum of \$125, and costs, against Irwin and Mrs. McGahey, and the plaintiffs had a decree for a foreclosure as prayed. From that judgment and decree the plaintiffs appealed to this court, and a former hearing resulted in an affirmance of the decree, except as to costs. As to that matter the district court was directed to tax all of the costs to the defendants. Our former opinion, *ante*, p. 385, contains a full statement of the facts, hence no further statement is required. It was there stated that the plaintiffs were neither entitled to a judgment against Irwin, nor a decree of foreclosure against his property, but as there was nothing in the record showing a cross-appeal, and as his brief assailing the decree was not filed in due season, he was not entitled to have the decree reviewed, and therein lies the error of our former judgment.

It appears that the transcript in this case was filed June 21, 1905. The plaintiffs filed their brief on January 27, 1906. Defendants filed their brief and cross-appeal March 7, 1906. Plaintiffs filed their reply on April 14, and the hearing was had in its regular order on April 17 of the same year. No objection as to time was made by plaintiffs when defendants' brief was served and filed, and no motion was made to strike because the brief had been filed out of time. So the plaintiffs cannot now challenge the defendants' right to assail the decree. While both parties were delinquent, in point of time, as to

filing briefs, yet we are satisfied that under the circumstances, as detailed above, the defendants filed their brief assailing the decree in due season. *Hahn v. Bonacum*, 76 Neb. 837; *Goos v. Goos*, 57 Neb. 294; *McDonald v. Buckstaff*, 56 Neb. 88. The record discloses that the defendants' brief was entitled "Appellees' Brief on Cross-Appeal," and from an examination of its contents it further appears that the decree was assailed, and affirmative relief was asked for thereby. That this amounted to the taking or prosecution of a cross-appeal seems clear under our system of appeals in equity cases in force before the statute of 1905, regulating appeals, went into effect. The plaintiffs, by filing the transcript and the whole record in this court, opened the decree, so that the whole case stood for trial *de novo*. *Armstrong v. Mayer*, 69 Neb. 187.

Coming now to consider the merits of the controversy, we are satisfied with what was said in our former opinion as to the plaintiffs' right to recover against Irwin and have a decree foreclosing the mechanic's lien. We quote therefrom as follows: "The most that can be said of the evidence on this point is that Mrs. McGahey had the bare authority to collect the rents accruing from this property and pay them over to her daughter. It will not be claimed, we think, that such authority carried with it implied authority to bind the owner by contracts for improvements. It is true, the improvements inure to the benefit of the owner of the fee, but the same may be said of improvements made by a tenant; but a tenant cannot subject the interest of his landlord in the premises to a mechanic's lien. *Waterman v. Stout*, 38 Neb. 396." It follows, then, that the judgment against Irwin should be reversed.

This brings us to the consideration of the question of the costs. It appears that Mrs. McGahey, with whom the contract for the plumbing in question was made, offered to pay the plaintiffs \$150 in satisfaction of their claim. This offer was refused. There is no competent evidence of a tender in the record, or that such tender was kept good.

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It does appear, however, that she offered to pay the plaintiffs \$125 after the action was commenced, and brought that sum into court, and tendered it by her answer. This was in effect an offer to confess judgment for that amount, and to authorize the court to render a judgment against her for that sum. The plaintiffs having failed to recover a greater amount were not entitled to recover costs after the filing of her answer, and it was error for the district court to render judgment against her for any part of the costs accruing after that time. It further appears that she has paid the amount of the judgment into court, and that the same has been accepted by the plaintiffs.

For the foregoing reasons, our former judgment is vacated, the judgment of the district court is reversed and the cause remanded, with directions to that court to dismiss the action as to defendant Irwin, and render judgment against the plaintiffs for all the costs which accrued after the filing of the defendant McGahey's answer.

JUDGMENT ACCORDINGLY.

E. L. HOLYOKE, EXECUTOR, APPELLANT, v. MARY IDA SIPP
ET AL., APPELLEES.

FILED OCTOBER 18, 1906. No. 14,399.

Wills: EXECUTION: PROBATE. A presumption of the due execution of a will arises from the presence of an attestation clause which recites the facts necessary to the validity of the will, and, in the absence of evidence discrediting the statements, the will should be admitted to probate.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed.*

Talbot & Allen, for appellant.

A. S. Tibbets and John S. Bishop, contra.

DUFFIE, C.

E. L. Holyoke, the executor named in a paper purporting to be the last will and testament of William Robertson, has appealed from an order of the district court for Lancaster county refusing to admit the will to probate. John Krummack and W. J. Adamson were the subscribing witnesses. The testator and subscribing witnesses were employed in the freight house of the Burlington & Missouri River Railway Company at Lincoln. The witnesses testified that Robertson brought the paper to them there and requested their signatures. It does not appear that the witnesses were employed in the same room, and neither can testify that they subscribed their names in each other's presence. This, under our statute, is immaterial. *Dewey v. Dewey*, 1 Met. (Mass.) 349; 1 Jarman, Wills (5th ed.), p. 209. Their testimony is also lacking in certainty as to whether the testator declared that the paper on which he desired their signatures was his last will and testament, but we are satisfied that from previous conversations with him both the witnesses understood that it was his last will and testament, and that they were requested to attest it as such. This we think not fatal in view of the attestation clause attached, and the same may be said of the failure of the witnesses to remember with certainty whether the will was signed by the testator when the same was signed and attested by them. The attestation clause attached to the will is in the following language: "Signed and acknowledged by the above testator in the presence of us present and in the presence of each other subscribe our names this 21st day of April, 1900, A. D. at Lincoln, Neb. U. S. A. John Krummack, Jr., William J. Adamson."

It clearly appears from the evidence that the testator wrote his own will, and this probably accounts for the fact that the attestation clause is not as full and formal as in general use, but it states with certainty that the will was signed by the testator in the presence of the wit-

nesses, and acknowledged by him, and that their names were subscribed in his presence. These are the essential requirements under our statute to the making of a valid will. See Ann. St., sec. 4992. There being no satisfactory evidence discrediting the facts set out in the attestation clause of the will, the force and effect to be given its recitals are thus stated in 1 Underhill, Law of Wills, sec. 201: "Where one or more of the witnesses are absent, the will may be admitted to probate upon the presumption of regularity arising from a perfect and formal attestation clause which recites that all statutory requirements were complied with, supplemented by proof of the handwriting of the testator and of that of the absent witnesses. So, when the subscribing witnesses are present at the probate and admit the genuineness of their signatures, but deny or are unable to recollect some or all of the facts which were attendant upon the execution, so that one or both of them are unable or unwilling to testify with positiveness and of their own knowledge that all the requirements of the statute were complied with, a presumption of due and proper execution will arise from the recitals of a perfect attestation clause, which becomes conclusive in the absence of satisfactory proof to the contrary." Numerous cases are cited by the author supporting this rule.

We recommend a reversal of the judgment of the district court and that the cause be remanded for further proceedings.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

**FRANK SHUTT ET AL., APPELLANTS, V. AUGUSTUS LOCKNER,
APPELLEE.**

FILED OCTOBER 18, 1906. No. 14,437.

1. **Landlord and Tenant: WITHHOLDING POSSESSION: DAMAGES.** The measure of damages for the wrongful eviction of a tenant by his landlord, or for wrongfully withholding possession of the leased premises, is ordinarily the rental value of the property for the unexpired term, less the amount of rent reserved by the lease.
2. ———: ———: ———. In a proper case special damages in addition may be awarded, where such damages are certain and the natural result of the wrong complained of.

APPEAL from the district court for Butler county:
BENJAMIN F. GOOD, JUDGE. *Affirmed.*

Matt Miller, for appellants.

L. S. Hastings and *A. M. Post*, *contra*.

DUFFIE, C.

The single question presented in this case is the measure of damages to which the plaintiffs are entitled for failure of the defendant to give them possession of 160 acres of hay land under a lease for the year 1901. It is alleged in the petition that plaintiffs on March 27, 1901, leased the premises from the defendant for the term of one year for the sum of \$480, one-half of this sum to be paid September 1, 1901, and the remainder November 1, 1901; that on or about April 15, 1901, the defendant leased the premises to one Powell and refused to give the plaintiffs possession; that Powell cut and appropriated the hay on said premises, and that plaintiffs have been damaged to the amount of \$2,870 by defendant's breach of contract. After the plaintiffs had introduced their evidence and rested, the court directed a verdict in their favor for \$1, and from a judgment entered on the verdict the plaintiffs have appealed to this court.

The plaintiffs' evidence was amply sufficient to establish the making of the lease and the refusal of the defendant to give them possession. On the question of damages, they offered to prove the amount of hay grown on the land and the value of the same on the ground. They also offered to show the expense of harvesting the hay and hauling the same to the railroad station, and the market value of the hay on the market, less the cost of transportation. These offers were refused by the court. No evidence was offered that the rent reserved was less than the rental value of the land at the time of the alleged breach on the part of the defendant, and the rejected evidence was offered as a basis for the recovery of profits as such. It is urged by the plaintiffs that their measure of damages is the profit they were prevented from realizing in not being allowed to cut and market the hay, and that the court erred in not allowing them to introduce evidence to show what that profit would have been. The defendant insists that their measure of damage is the difference, if any, between the rent reserved and the value of the lease at the date of the breach.

In *Cannon v. Wilbur*, 30 Neb. 777, it was said: "Ordinarily, where a tenant is wrongfully evicted by his landlord, the measure of the tenant's damages is the rental value of the property for the unexpired term, less the amount of rent reserved by his lease." While apparently conceding that this is the general rule of damages applicable in this class of cases, it is earnestly insisted by the plaintiffs in this particular instance that the profits were definite and certain and recoverable as damages. When the case was tried, the hay on the leased premises had matured, had been harvested, and its market value had been determined, and, in the sense of their knowing what profit or loss the plaintiffs would have made, the lapse of time had furnished them with evidence of the amount of hay which the land had produced and its market price. It is a universal rule that only such damages are recoverable for a breach of contract as naturally result from the breach.

Kingsley v. Butterfield, 35 Neb. 228. In this case the breach occurred in April, and before the hay had matured. At that time the right of action for the breach accrued to the plaintiffs. Had the action been commenced and tried at that time, the amount of hay which the land would produce, the market value of the hay when harvested, and other elements which would enter into the question of whether the plaintiffs would profit or lose from their venture were matters of conjecture and speculation. Clearly no rule of law administered by our courts would allow damages to be predicated on opinions that might be formed relating to these questions. The fact that these questions had been determined by lapse of time when the case was tried does not in the least change the rule of law as to the evidence admissible to establish the plaintiffs' damage. *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. (Unof.) 340; *Shaw v. Hoffman*, 25 Mich. 162, and other similar cases are relied on by the plaintiffs in support of their claim that evidence of their profits, had they been allowed to cut and market the hay, should have been received by the court. In these cases the tenants were in possession of the leased premises, conducting an established business, when the breach and eviction occurred. By the breach and eviction they not only lost the benefit of their lease, but their business was also broken up and injured or destroyed, and this destruction of their business was allowed as an element of damage. That one may recover for an injury to a profitable business is not a question for debate, and, where a wrongful eviction by a landlord has this effect, damage may be recovered therefor. We do not wish to be understood as holding that evidence of the probable crop of hay the land would produce and the ordinary market value thereof might not be shown as facts to be considered by the jury in arriving at the value of the use of the land during the term, and if the rejected testimony had been offered for this purpose it would undoubtedly have been received. *Snodgrass v. Reynolds*, 79 Ala. 452. What we do hold is

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that under the circumstances of this case prospective profits, which plaintiffs claim to have lost, was not a proper element of damage. Jones, Landlord and Tenant, secs. 140-171. There being no evidence that the value of the lease was greater than the rent reserved, and no part of the rent having been paid, the plaintiffs were entitled to nominal damages only, and the court properly directed a verdict for \$1.

We recommend an affirmance of the judgment.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MARVIN H. MEAD, APPELLEE, v. IDA M. BREWER ET AL.,
APPELLANTS.

FILED OCTOBER 18, 1906. No. 14,448.

1. **Tax Certificate: FORECLOSURE: LIMITATIONS.** An action to foreclose a tax sale certificate may be commenced at any time within five years from the date when redemption from the sale may be made by the owner.
2. ———: **PURCHASE OF TITLE: MERGER.** Where the holder of a tax sale certificate purchases and takes from the owner a conveyance of the patent title, his tax lien becomes merged in the legal title so conveyed to him, and he cannot assert it in hostility to the claim of a third party holding another tax lien against the premises.

APPEAL from the district court for Sherman county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

T. S. Nightingale, for appellants.

R. J. Nightingale, contra.

DUFFIE, C.

On February 23, 1905, Marvin H. Mead, the plaintiff and appellee, commenced an action in the district court for Sherman county to foreclose a tax sale certificate issued on the sale of certain lots in Loup City for the delinquent taxes of 1895-1897, both inclusive. The certificate is dated March 6, 1899, and it is argued that our statute requires an action of this character to be commenced within five years from the date of the certificate, and that the action is barred. It is true that the language of the statute implies that an action to foreclose a lien should be commenced within five years from the date of the tax certificate, but as early as 1889 this court held that the statute should be construed to mean that such an action may be brought at any time within five years after time for redemption from the sale has expired. *D'Gette v. Sheldon*, 27 Neb. 829. This holding has been followed in numerous cases to the present time. In one of the later cases, *Darr v. Wisner*, 63 Neb. 305, we were urged to reverse our former holding, and then said: "The terms of the statute appear to the mind of the writer to support appellant's contention, and were the question a new one, we would hold that the action should be brought within five years from the date of the certificate; but by repeated decisions of this court the rule is well established, and is so recognized by the profession, that an action to foreclose a tax lien is barred within five years after the time to redeem from the tax sale has expired." The first holding has been so long and frequently followed that, regardless of our own opinion, we do not feel called on to reverse it.

The record shows a second sale of the same premises to Frank E. Brewer made September 10, 1903, for the delinquent taxes of 1898 to 1901, both inclusive. Brewer filed his cross-petition asking that his tax sale certificate be foreclosed. At the time of this last sale one O. P. Mason was the owner of the fee title, and on November

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20, 1903, Brewer purchased the premises from Mason and took a conveyance from him. The district court held that his tax lien merged in the legal title thus acquired. It is a general rule that, where a person acquires a greater and lesser estate in the same property, this constitutes a merger of the two estates. *Mathews v. Jones*, 47 Neb. 616. It is true in this case that, after demand had been made upon Brewer for redemption from the plaintiff's lien, and shortly prior to the commencement of this action, he conveyed this land to his sister subject to the taxes of the years named in his tax sale certificate, and he now insists that this, together with his failure to surrender his certificate for cancelation, was evidence of his intention not to merge his tax lien in the fee estate. The merger, if it occurred, took place when he purchased from Mason, and the failure to file his certificate with the treasurer for cancelation is not, we think, evidence sufficient to overcome the legal presumption of merger arising from his purchase of the legal estate, even if nonmerger could be allowed as against the claim of the plaintiff and in hostility to his claim.

In *Boucher v. Trembley*, 140 Mich. 352, it was held that the purchase of the patent title by the holder of a tax deed merged the tax title in the legal or patent title, so that the purchaser took title subject to the equity of one in possession to claim for improvements made on the premises. This would not probably be held in those states where the making of a tax deed invests the holder with a new and independent title superior to all outstanding liens and equities held by others against the land; but in Michigan the owner of the legal title has a right of redemption for six months after the making of his tax deed, and because of this provision of the statute the Michigan court held that the tax deed, for six months after its date, operates only as a lien against the property which merges in the legal title when the same is bought in by the tax purchaser, and that it cannot be asserted in opposition to an equitable claim against the land held

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by a third party. On the same principle, Brewer will not, after acquiring the legal estate in the land in question, be allowed to hold his tax lien independently of his legal title for the purpose of defeating the prior lien held by the plaintiff and appellee under his tax certificate.

We think the decree of the district court was, under our former decisions, the only one which could be entered in the cause, and therefore recommend its affirmance.

JACKSON, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

ISAAC G. TRAUERMAN ET AL., APPELLANTS, V. NEBRASKA
LAND & FEEDING COMPANY, APPELLEE.

FILED OCTOBER 18, 1906. No. 14,449.

Sales: RECOVERY OF MONEY PAID. It is a rule generally enforced that a purchaser who has advanced money in part performance of a contract, and who refuses to proceed, the seller being ready and willing to perform on his part, cannot recover back money so advanced; but to subject the purchaser to this penalty or forfeiture it should clearly appear that he has wholly abandoned the contract and wilfully refused to proceed thereunder.

APPEAL from the district court for Cherry county:
JAMES J. HARRINGTON, JUDGE. *Reversed.*

Allen G. Fisher, for appellants.

Albert W. Crites, contra.

DUFFIE, C.

This is the second appeal in this case. The first trial resulted in a judgment for the plaintiffs, and upon appeal to this court the judgment was reversed and the case

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remanded. A full and clear statement of the facts in the case by Mr. Justice BARNES may be found in 70 Neb. 795. Upon the second trial judgment went in favor of the defendant, and the case is now here on appeal taken by the plaintiffs below.

As will be seen by the statement of facts given in the first opinion, the suit is to recover \$1,000 advanced by the plaintiffs as earnest money or part payment made by them upon a purchase of 500 calves to be delivered to them by the defendant at Irwin on October 22, 1900. On the trial the plaintiffs attempted to show that at the time of entering into the written contract, and for the same consideration, there was a further oral agreement that the delivery might, at their request, be delayed for a week or ten days. We held on the former appeal that this evidence was incompetent as varying the terms of the written contract. No material additional evidence was introduced in support of the plaintiff's claim on the second trial, and at the conclusion of the evidence the court directed a verdict for the defendant. The evidence is clear that sometime prior to the 22d day of October, when delivery of the calves was to be made, defendant wrote to the plaintiffs that it had secured the calves and would be at Irwin to make delivery at the time specified. At the time called for by the written agreement defendant had the calves at Irwin ready to deliver, but the plaintiffs were not there to receive them or to make payment for the remainder due. Thereafter, not being able to arrive at a settlement of their dealings, this action was commenced by the plaintiffs to recover the money advanced. The only question, therefore, presented by this appeal is whether a party who has made part payment upon a purchase of property, and who fails to perform on his part, can recover the money so advanced. On this question the authorities, while not numerous, are generally to the effect that he cannot.

In *Hansbrough v. Peck*, 5 Wall. (U. S.) 497, it is said: "The party who has advanced money, or done an act in

part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done."

In *Haynes v. Hart*, 42 Barb. (N. Y.) 58, the plaintiff attempted to recover money advanced as part of the purchase price of a canal boat. A demurrer to his petition was sustained upon the ground that it showed a breach of the contract on his part. On appeal, the court said: "The plaintiff cannot recover on the ground of his own breach of the agreement; and the contract does not provide for a repayment of the money paid in part performance, in case of a rescission according to the stipulations of the contract. Nor will the law imply a promise in such a case. To allow the plaintiff to recover back the purchase money paid, in a case like this, would be to offer an inducement to a purchaser to violate his agreement. It would give him the use of the canal boat for a year without compensation, and put it wholly in his power to perform or not at his pleasure. I think no case can be found where a purchaser has been allowed to recover back partial payments after a default in making further payments, when the vendor has merely kept the property agreed to be sold, or sold it to another, in consequence of such default. In order to entitle a purchaser to recover under such circumstances he must show that the other party has been guilty of some breach on his part, or of some act in hostility to the contract."

In *Walter Bros. v. Reed & Gerard*, 34 Neb. 544, it is said: "If a purchaser has advanced money in part performance of a contract, and without fault on the part of the seller refuses to proceed, the seller being ready and willing to perform on his part all the stipulations of the agreement, the purchaser cannot recover back what he has paid."

In *Lexington Mill & Elevator Co. v. Neuens*, 42 Neb.

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649, this court, after referring to the case of *Walter Bros. v. Reed & Gerard*, *supra*, said: "In view of the frequency with which it might be supposed this question would arise, the authorities elsewhere are remarkably few and the cases wherein the principle has been involved are not harmonious. Had the case rested upon the defendant's counter-claim, in ascertaining his damages, the fact that he had already received the \$100 might be one for consideration; but this instruction related to the plaintiff's cause of action and not to the counter-claim, and if, instead of alleging performance on its part, the plaintiff had alleged in the petition that it paid the \$100 and then refused to receive the grain, such a petition would have been demurrable. It would trace the right to recover through the plaintiff's own breach of contract. We are satisfied with the rule announced in *Walter Bros. v. Reed & Gerard*, and the instruction given was correct, in view of that rule."

In the cases above cited the purchaser had absolutely refused to proceed further in performance of his contract. In the case we are now considering, a few days prior to the time fixed for delivery the plaintiffs wrote defendant requesting that the delivery be delayed for a few days as their business was such that they could not be present to receive the calves. Defendant made no response to this request, but proceeded to tender delivery at the time and place named in the contract. Plaintiffs not being there to receive the calves and make final payment, defendant drove them away, and now has possession of the same and of the \$1,000 paid thereon. While it is clear from the record that plaintiffs failed to observe the strict terms of their contract, it is not at all clear that they absolutely repudiated it. There is evidence from which it might be inferred that at a later date they were ready and willing to receive and pay for the calves, and if this state of facts can be established to the satisfaction of a court and jury we hardly think the case one in which the rule demanding forfeiture of the advanced payment would apply. What-

ever damages the defendant may have sustained in consequence of the failure of the plaintiffs to promptly receive and pay for the calves according to the strict terms of the contract should, of course, be allowed it; but to say that a forfeiture of the entire advance payment should be imposed upon the plaintiffs, without clear proof that they had repudiated the contract and refused to proceed thereunder, is going further than we think the rule requires or we are disposed to go.

We recommend a reversal of the judgment and remanding the cause for a second trial.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded for a second trial.

REVERSED.

FREDERICK H. WEEKE ET AL., APPELLANTS, v. HENRY W. WORTMANN, ADMINISTRATOR, ET AL., APPELLEES.

FILED OCTOBER 18, 1906. No. 14,410.

1. **Probate Court: APPEAL.** An appeal lies from a final order or judgment of a county court in probate matters to the district court, whether such order or judgment be upon the merits or otherwise.
2. **Petition examined, and held** to state a cause of action for relief against an order of the probate court alleged to have been procured by fraud and imposition.

APPEAL from the district court for Thayer county:
LESLIE G. HURD, JUDGE. *Reversed.*

Baldwin & Torgerson, Charles H. Sloan and T. C. Marshall, for appellants.

R. D. Sutherland and J. T. McCuiston, contra.

ALBERT, C.

On the 6th day of January, 1902, Henry William Weeke died intestate in Thayer county. He left a widow and one child, a son, plaintiffs in this case. On the 11th day of January of the same year the plaintiffs and four of the defendants entered into an agreement in writing for the distribution of the estate, which is as follows: "This agreement entered into this 11th day of January, 1902, between the heirs of Henry William Weeke, deceased: Witnesseth, that the undersigned have agreed, and do hereby covenant and agree, with each other, to settle the estate of Henry W. Weeke, as follows: (1) All debts shall be paid. (2) The widow, Kathrina E. Weeke, shall receive all the household goods, \$200 in cash, and one-third of the remainder of the estate. (3) Out of the remainder of the estate, Lottie Knoerenschild shall receive \$200, and Frederick H. Weeke shall receive \$500. (4) The state remaining after the widow shall have her portion, and the said sums have been paid Lottie Knoerenschild and Frederick H. Weeke, shall be divided into five equal parts. Mrs. Minnie Wortmann shall receive one-fifth, Herman H. Burstadt shall receive one-fifth, Lottie Knoerenschild shall receive one-fifth, Henry H. Stockham shall receive one-fifth, and Frederick H. Weeke shall receive one-fifth. In witness whereof, we have hereunto set our hands, at Deshler, Nebraska, the day and year first above written." Afterwards the other defendant was duly appointed administrator of the estate by the county court of Thayer county. On the 24th day of October, 1902, the administrator rendered a final account, which was approved and allowed on the 18th day of November, 1902, and an order of distribution was entered in accordance with the written agreement hereinbefore set out. He made distribution in accordance with such order, each distributee receipting for his share, and on the 10th day of January, 1903, was discharged from his trust. On the 9th day of February, 1905, the plain-

tiffs filed their petition in the county court, praying that the order allowing the administrator's final account, the order of distribution, and that discharging the administrator, be vacated and set aside. A demurrer was interposed and sustained, and the cause dismissed.

The plaintiffs appealed to the district court. Their petition filed in the district court alleges the death and intestacy of the decedent, plaintiff's relationship to him, and that they are his sole and only heirs at law. It also alleges the making of said agreement for distribution, the appointment of the administrator, the proceedings in the matter of said estate had in the county court and hereinbefore mentioned, and the distribution of the estate in accordance with the order of the county court. The petition also contains the following allegations:

"(10) That the plaintiff, Frederick H. Weeke, is mentally weak, easily influenced, deceived and defrauded, and is of weak mind and memory, and on or about the 11th day of January, 1902, the defendant Henry W. Wortmann, with intent to cheat and defraud this plaintiff, presented to him an agreement, marked 'Exhibit G' and made a part hereof, and falsely and fraudulently, and with the intent to cheat and defraud this plaintiff, represented to him that Minnie Wortmann, who is the wife of the defendant Henry W. Wortmann, and Herman H. Burstadt and Henry H. Stockham, who are brothers-in-law of the defendant Henry W. Wortmann, and Lottie Knoerenschild, his sister-in-law, were heirs of said estate of Henry William Weeke, deceased, and entitled to share therein, and that unless the plaintiff would sign said agreement the whole estate would be squandered and wasted in litigation, and that if plaintiff would sign said agreement, and also have said defendant Henry W. Wortmann appointed administrator of said estate, he, the plaintiff, would be greatly benefited thereby and receive \$500 more than he was legally entitled to; that plaintiff, Frederick H. Weeke, believing and relying on said false and fraudulent representations, as aforesaid, was de-

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ceived thereby and was fraudulently induced to sign said void agreement, without any consideration therefor, the inducements for signing said void agreement being only the aforesaid false and fraudulent representations, and that said void agreement was thereafter used by the defendant, Henry W. Wortmann, fraudulently, to induce, by fraud and deceit, the said county court to approve his final report as administrator, and said court was by said fraud and deception thereby induced on the 18th day of November, 1902, to make the order of distribution.

* * * Said plaintiff was thereby defrauded of the sum of \$9,000 by the said defendants, all of whom shared in the proceeds, as shown by the various receipts of the defendants, copies of which are hereto attached, marked 'Exhibit H' and made a part hereof, and that said defendants were not in fact heirs of said estate, and were not entitled to share in the proceeds of said estate, and said money was procured by fraud and deceit, and said plaintiff, Frederick H. Weeke, was wronged and defrauded thereof and thereby.

"(11) That the defendant Henry W. Wortmann, well knowing the mental weakness of this plaintiff, Frederick H. Weeke, and with intent to cheat, wrong, and defraud said plaintiff, employed one Henry Bredenbeck, who, acting under the advice and direction and on behalf of said defendant, went to the home of the plaintiff about the 24th day of November, 1902, and represented to said plaintiff that the law required him, said plaintiff, to sign a certain receipt, a copy of which is hereto attached, marked 'Exhibit I' and made a part hereof, and that he had to sign the same to get any money from said estate, and that by signing the same he would receive \$500 more than he was entitled to under the laws of the state of Nebraska, all of which was false and untrue and made for the purpose of cheating and defrauding said plaintiff, and was made at the instigation and under the direction of said defendant, and for the purpose of deceiving the county judge, and to thereby obtain the approval of the

aforesaid false and fraudulent final report of Henry W. Wortmann, as administrator. In fact and in truth said plaintiff signed said receipt without any consideration, and relying upon the false and fraudulent representations aforesaid, and said receipt was used by said defendant before the county court in procuring the final order of discharge set out in 'Exhibit F,' and said order was thereby obtained from said court by fraud and deceit.

"(12) That the defendant, Henry W. Wortmann, during all the time that he was acting as administrator of said estate, and for a long time theretofore, knew that said plaintiff was mentally weak, and easily deceived, influenced and imposed upon, and the same was also known by all of the defendants, and that all of the defendants well knew that said plaintiff was the sole heir-at-law of the said Henry William Weeke, deceased, and that the defendants were none of them heirs to the said estate, or any part thereof, and that said defendants with intent to cheat and defraud this plaintiff, in the manner aforesaid, conspired together, and were each and all of them instrumental in perpetrating said fraud and in sharing in the proceeds thereof.

"(13) That the plaintiff Frederick H. Weeke had no knowledge of said fraud until within the last six months prior to the commencement of this suit in the county court."

They also tendered an answer to the defendant administrator's petition for discharge, setting forth substantially the same matters as those alleged in their petition for the vacation of the orders of the county court. The defendants demurred on three grounds: (1) That the facts stated are insufficient to constitute a cause of action; (2) that the court had no jurisdiction of the subject matter; and (3) that it had no jurisdiction over the person of the defendants. The demurrer was sustained, and the plaintiffs electing to stand on their petition, judgment was given for the defendants. The plaintiffs appeal.

Neither the petition nor any other part of the record

shows upon what grounds the defendants, who entered into the agreement with the plaintiffs for a distribution of the estate, claimed any portion thereof. But some light is thrown on this question by the brief filed in their behalf, from which it appears that the wife of the deceased, who is one of the plaintiffs in the case, had married twice before she married the deceased, and had children by both former husbands; that upon her marriage to the deceased her children by her former husbands were taken into his home and brought up as members of his family, and they and the plaintiff, Frederick H. Weeke, the one child of the deceased, were raised together as brothers and sisters. It is also stated in the brief referred to that upon the marriage of the deceased he appropriated all the property left by the former husbands of his wife, and that the estate left by him includes the estates of the former husbands. But, as before stated, these things are not matters of record, and we refer to them merely as offering an explanation of the somewhat extraordinary state of facts set forth in the petition..

We think the petition states a cause of action in favor of the plaintiff, Frederick H. Weeke. It shows that the plaintiffs are the sole and only heirs at law of the deceased; that the order of distribution made by the county court was based on the written agreement entered into between the plaintiffs and four of the defendants, whereby the latter were allowed to share as heirs in the distribution of the estate; that the defendant administrator, in pursuance of a conspiracy to which all the defendants were parties, and for the purpose of inducing the plaintiff, Frederick H. Weeke, to enter into said agreement, falsely and fraudulently represented to him that the other defendants were joint heirs with said plaintiff and entitled to share with him in the distribution of the estate; that said plaintiff was weak minded and, in consequence, easily influenced; that relying on the said false and fraudulent representations, and believing them to be true, said plaintiff was thereby induced to enter into

the agreement in question; that he did not discover that said representations were false until about six months before the commencement of this suit. The foregoing facts stand admitted by the demurrer and in view of the defendants' claim that those of them who had joined in the agreement had been brought up under the same roof with the plaintiff, Frederick H. Weeke, his charge that he relied upon the representations and believed them to be true is not inherently improbable. Those facts standing admitted, it is clear that the orders of the county court, based upon the agreement and obtained in the manner charged, were procured by fraud practiced by the defendants, and entitle Frederick H. Weeke to relief.

It is contended that the district court acquired no jurisdiction of the subject matter on appeal from the judgment of the county court. If we understand the argument on this point, it involves the proposition that an appeal will not lie from the judgment of a county court rendered in a matter within its exclusive original jurisdiction unless there has been a hearing upon the merits, and that error is the exclusive remedy in such case. We do not think there is any authority for that proposition. While the constitution gives county courts exclusive original jurisdiction in probate matters, section 17, art. VI, provides: "Appeals to the district courts from the judgments of county courts shall be allowed in all criminal cases on application of the defendant; and in all civil cases, on application of either party, and in such other cases as may be provided by law." Section 42, ch. 20, Comp. St., provides: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county court to the district court by any person against whom any such order, judgment, or decree may be made, or who may be affected thereby." The constitution certainly authorizes the foregoing section, and the only condition precedent to an appeal, according to this section, is a final order, judgment, or decree, without regard to whether the hearing

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was upon the merits or otherwise. As to the jurisdiction of the district court over the person of the defendants, as we have seen, it had jurisdiction of the subject matter. The defendants entered a general appearance. Our attention has not been called to anything that was lacking to give the court complete jurisdiction over the person of defendants. A considerable portion of the argument in this case is based on matters entirely outside the record. We cannot go into such matters. The point we decide is that the petition states a cause of action in favor of the plaintiff, Frederick H. Weeke, and against the defendants, and that the demurrer thereto was erroneously sustained.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

SARAH STRAWN, EXECUTRIX, ET AL., APPELLANTS, v. FIRST NATIONAL BANK OF HUMBOLDT, APPELLEE.

FILED OCTOBER 18, 1906. No. 14,431.

Action: MISJOINDER. In an action by several plaintiffs against a bank for an accounting on certificates of deposit, where it is evident from the petition that assignments of fractional parts of the separate demands have been made by each plaintiff to his co-plaintiffs, and that the interest of each in the total sum is equal to the amount of the certificate originally held by him, and that the purpose of such assignments was to enable them to join in a single action, *held* that a demurrer for misjoinder of causes of action was properly sustained.

APPEAL from the district court for Richardson county:
WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

R. S. Maloney and Reavis & Reavis, for appellants.

Francis Martin and Edwin Falloon, contra.

JACKSON, C.

It appears from the petition that each plaintiff had a time check drawn on the defendant bank by one Samuelson, and that each check represented an independent and distinct transaction in nowise connected with the issuing of the other checks. It is alleged that the checks are in fact certificates of deposit upon which the bank is liable. Each of the plaintiffs assigned a fractional part of his claim to his coplaintiffs, but it is conceded that the interest now claimed by each in the sum of the checks equals the amount of the check held by him in the first instance. They joined as plaintiffs in an action against the bank to recover on these checks. The defendant interposed a demurrer to the petition on two grounds: First, that the petition does not state facts sufficient to constitute a cause of action; and second, that several causes of action are improperly joined. The demurrer was sustained in the district court and the action dismissed. The plaintiffs appeal.

Each plaintiff claims an interest in all of the checks or certificates of deposit, whatever they may be termed, and it is urged that, while their rights arising under the partial assignments would not be enforced in an action at law without the consent of the bank, a court of equity will take cognizance of these assignments and compel an accounting. In the absence of the assignments set out in the petition the plaintiffs could not have joined either at law or in equity in a single action against the bank, and it is evident from the face of the petition that the partial assignments were made for the express purpose of enabling

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them to join in a single action, each for his own benefit and on behalf of the others, but equity will not sustain assignments for that purpose. *Hoagland v. Van Etten*, 22 Neb. 681. We are convinced from a reading of the petition that the assignment of fractional parts of the claims of the plaintiffs against the bank has not changed the relation of the parties and has resulted in a misjoinder of causes of action.

The judgment of the district court dismissing the bill was right, and we recommend that it be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FRED CORDSON V. STATE OF NEBRASKA.

FILED NOVEMBER 10, 1906. No. 14,678.

1. Information. Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute.
2. Incest. Section 204 of the criminal code, which declares that a father who shall rudely and licentiously cohabit with his own daughter, shall be guilty of incest, and which provides a punishment therefor, is valid and is sufficient in form and substance to create the offense therein described. *State v. Lawrence*, 19 Neb. 307, followed.

ERROR to the district court for Thurston county: GUY T. GRAVES, JUDGE. *Affirmed.*

Hiram Chase, for plaintiff in error.

Norris Brown, Attorney General, *W. T. Thompson* and *W. E. Whitcomb*, contra.

BARNES, J.

Fred Cordson, hereafter called the defendant, was tried by the district court for Thurston county, and found guilty of the crime of incest, as defined by section 204 of the criminal code. He was thereupon sentenced to the state penitentiary for a term of seven years. To reverse that judgment he has brought the case here by petition in error. The record contains no bill of exceptions, and defendant's petition contains but one assignment, to wit, "That the court erred in overruling defendant's motion in arrest of judgment."

His first contention is that the information on which he was tried does not state facts sufficient to charge him with the commission of any crime. To this it is sufficient answer to say that the information charges him with the commission of the offense in the language of the statute creating it. It is a well-established rule that to charge a statutory offense it is sufficient if it be charged in the language of the statute. In *Bolen v. People*, 184 Ill. 338, it was said: "An indictment charging the accused with the crime of incest in the language of the statute is sufficient, though it fails to allege the act was feloniously or knowingly committed, since the crime of incest was not a felony at common law and is indictable only by virtue of the statute." It will be observed in passing that section 204 of our criminal code is a literal copy of the statute of Illinois. In *Leisenberg v. State*, 60 Neb. 628, it was said: "Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute." To the same effect are *State v. Lauver*, 26 Neb. 757; *Wagner v. State*, 43 Neb. 1; *Chapman v. State*, 61 Neb. 888, and *State v. Davis*, 70 Mo. 467. So the defendant's first contention must fail.

The defendant's second contention is that the section of the criminal code on which this prosecution is based is void, and, to use his own words, "is but a futile attempt

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on behalf of the legislature to provide punishment for a father's incestuous relations with his daughter, and the words used by the legislature come short of the purpose." This contention cannot be sustained, for the whole matter was put at rest by the decision in *State v. Lawrence*, 19 Neb. 307, where the validity of that section was upheld. As above stated, section 204 is a literal copy of the Illinois statute, and we find that for more than half a century its validity has been upheld by the courts of that state. We are satisfied with the rule in *State v. Lawrence*, *supra*, and the reasons there given to support it, and therefore decline to overrule that decision.

It is also claimed in the defendant's brief that the court did not accord him the constitutional right of being confronted by the witnesses against him. As before stated, the record contains no bill of exceptions, and the transcript is silent upon that question. So there is nothing before us to overcome the presumption of the regularity of the proceedings of a court of general jurisdiction, and we therefore cannot consider that matter. In fact, so much of the record as we have before us contains no reversible error, and the judgment of the district court is therefore

AFFIRMED.

PHILIP MCINTYRE v. L. K. MOTE, SHERIFF.

FILED NOVEMBER 10, 1906. No. 14,797.

Appeal: PRACTICE. Under the practice of this court, where the record contains no bill of exceptions and the pleadings are sufficient to support the judgment of the trial court, it will be affirmed.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Philip McIntyre, pro se.

Norris Brown, Attorney General, W. T. Thompson and J. B. Strode, contra.

LETTON, J.

This is a proceeding in error to review a judgment of the district court for Dawes county refusing to discharge the petitioner, Philip McIntyre, upon a writ of habeas corpus. The petitioner alleges that he was not convicted of any crime or offense and that he is illegally deprived of his liberty, having been brought from the state of Virginia into this state without any demanding writ from the governor of Nebraska or rendition writ of the governor of Virginia, contrary to the laws and constitution of the United States and of the state of Nebraska. He prays that he may be discharged from such illegal custody, and not molested until he has had time to return to the state of Virginia. At the hearing, the district court found in favor of the regularity and sufficiency of the proceedings and writ whereunder the petitioner was held, denied his petition and remanded him to the custody of the jailer to await trial upon the information pending against him. No bill of exceptions was preserved, and no motion for a new trial filed. Under the practice of this court, where the record contains no bill of exceptions and the pleadings are sufficient to support the judgment of the trial court, it will be affirmed.

The petition in error and the brief of the petitioner are couched in somewhat rambling and confused language, and it is difficult to see what particular point the petitioner seeks to raise thereby. Nevertheless, and though not required to do so, we have examined the return of the sheriff to the writ, which sets forth the proceedings under which the petitioner was arrested and is detained. It appears that on April 26, 1905, Allen G. Fisher filed his complaint against the petitioner in the district court for Dawes county, in substance charging the petitioner with forging a bill of exchange for \$250, and uttering and publishing the same as true and genuine, with the unlawful intent to defraud. Afterwards there was filed by leave of court an information by the county attorney

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of Dawes county, under section 585 of the criminal code, charging Philip McIntyre as a fugitive from justice with the same crime as in the complaint, and the clerk was directed to issue a bench warrant for the apprehension of the said McIntyre upon the charges in the information as a fugitive from justice of the state of Nebraska. This warrant was issued May 1, 1905. On the 20th of December, 1905, the governor of Virginia issued his warrant of rendition, reciting the proceedings in the district court for Dawes county, Nebraska, a request upon him by the governor of this state for the rendition of the accused, and directing the officers of the state of Virginia to arrest McIntyre, to afford him an opportunity to sue out a writ of habeas corpus, and afterwards to deliver him into the custody of L. K. Mote, the sheriff of Dawes county. The return of the sheriff further shows that in pursuance thereof he presented the warrant of rendition to one Tomlinson, an officer of the city of Richmond, Virginia, who thereupon arrested McIntyre, gave him an opportunity to sue out a writ of habeas corpus, and afterwards delivered McIntyre to him, and that by virtue of the warrant of rendition and the bench warrant he brought the petitioner to this state and now holds his body in the county jail. The proceedings set forth in the return seem in all respects to be regular and in accordance with law. Under the provisions of section 373 of the criminal code the return of the officer must be considered as *prima facie* evidence of the facts therein cited. No facts inconsistent therewith or contradictory thereof have been shown to exist. The petitioner therefore does not seem to be unlawfully restrained, but, on the contrary, appears to be legally confined by virtue of the complaint, the information and the warrant based thereupon.

The judgment of the district court is

AFFIRMED.

FREEMAN P. KIRKENDALL ET AL., APPELLEES, V. ERNEST S.
WEATHERLEY ET AL., APPELLANTS.

FILED NOVEMBER 10, 1906. No. 14,341.

1. **Assignment: EXECUTION: VALIDITY.** A voluntary assignment for the benefit of creditors, executed in a sister state according to the laws thereof, is ineffectual to convey real property situated in this state, unless it is executed and recorded in such manner as would render it so effectual if made in this state.
2. **Election of Remedies: ESTOPPEL.** A creditor, by participating in an insolvency proceeding begun in a sister state by a voluntary deed of assignment insufficient in form to be effectual to convey real property situated in this state, may become estopped to impeach a purported title of a purchaser of such property acquired in good faith in the progress of such proceedings.
3. **Mortgages: EQUITY OF REDEMPTION: FORECLOSURE.** Although by express stipulations in a trust deed or mortgage of land situated in this state the legal title and right of possession of such land may be conveyed to the trustee or mortgagee, yet the equity of redemption of the mortgagor cannot be extinguished by adversary proceedings other than judicial foreclosure.
4. ———: ———: **DEED TO MORTGAGEE.** When by express stipulations the legal title and right of possession of land situated in this state are conveyed to a trustee in a trust mortgage, the trustee may, with the knowledge and acquiescence of the mortgagor, without fraud or collusion, or the intent or effect to injure or defraud third persons, convey such legal title and right of possession to the mortgagee in consideration of a release and discharge of the mortgage debt, and in such a case a conveyance of the premises by the mortgagor, either directly or through a third person, to the mortgagee with the intent and purpose to extinguish the equity of redemption will have that effect.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Joel W. West, Guy R. C. Read and Jacob Fawcett, for appellants.

William Baird & Sons and Baldrige & De Bord, contra.

AMES, C.

The Lewis Investment Company is, or was, an Iowa corporation having its principal place of business at the city of Des Moines, in that state. It became insolvent, and on the 24th day of December, 1895, executed to one Nelson Royal, for an express nominal consideration of one dollar, a general assignment of all its property wherever situated, for the benefit of creditors, and reciting the trusts and powers usual in such instruments. Royal was a private citizen and a resident of the city named. At the time of the execution and delivery of said instrument the corporation was the owner of a city lot in the city of Omaha, in this state, but the assignment was filed for record in Douglas county on the same day as 1896, some ten months after its execution, but it was as to form and substance in conformity with the statute of the state of Iowa relative to the subject of voluntary assignments for the benefit of creditors. On the 26th day of August, 1896, Royal, pursuant to a judicial order rendered by one of the Iowa courts, conveyed the lot, or attempted so to do, to one Sage, and Sage afterwards deeded it to one Smith. The former of these deeds was filed for record in Douglas county on the same day as the assignment, but the latter not until September, 1902. Smith executed a lease of the premises to Kirkendall, one of the plaintiffs below and appellee, who went into and is now in possession of the same. The other plaintiff below and appellee is the executor of the will of Smith, now deceased. At the time of the execution of the assignment the Lewis Investment Company was indebted to the Des Moines National Bank upon certain promissory notes which the latter afterwards sold and assigned to defendant and appellant, Weatherley, who in 1904, begun in the district court for Douglas county a suit in foreign attachment thereon against the investment company, and caused a levy to be made upon the Omaha lot. The action proceeded regularly to judgment, sale and confirmation,

and the issuance of a writ of assistance to put the purchaser, who is the plaintiff in attachment, into possession, when this suit was begun by the tenant and the executor of the lessor to perpetually restrain the process and obtain a decree quieting their title and possession. The defendant filed a cross-bill, praying similar relief in his own behalf, and upon the issues thus joined there was a trial, resulting in a judgment for the plaintiffs, from which this appeal is prosecuted.

The statute of this state relative to voluntary assignments enacts that "no voluntary assignment for the benefit of creditors hereafter made shall be valid unless the same shall be made in conformity to the terms of this act." Comp. St., ch. 6, sec. 1. It further provides that every such assignment shall name as assignee the sheriff of the county in which the assignor or one of several assignors resides, "and within 24 hours after its execution it shall be filed for record in the clerk's office of the county in which the assignee resides" (sec. 6), and within 30 days thereafter in the clerk's office of every county in which there shall be real estate of the debtor, and that a failure of such record within the time aforesaid shall avoid the instrument as to the property situated in any such county. It is likewise enacted that "real estate so assigned shall be described in the deed of assignment in such manner as would be requisite in an ordinary deed of conveyance thereof" (sec. 3). None of these requirements was complied with in the instrument under discussion, so that it is quite evident that if it had been executed in this state it would have been wholly ineffectual for any purpose. *Sager v. Summers*, 49 Neb. 549. And if in such a case it had complied with all of them except that with respect to description, it would without doubt have been insufficient to convey the lot in suit. Saying nothing about the other requirements, can omission to comply with those relative to description and recording be excused and the instrument upheld for the reason that the assignor was a nonresident of the

state or a foreign corporation? The evident policy of the law is to compel the immediate identification of the real property sought to be conveyed, and facilitate, not only the record of the instrument, but also the ascertainment by mere inspection whether such record has been duly made. One obvious object of this regulation is that creditors may be speedily advised whether lands of the debtor situate in any particular county are or will be claimed by the assignee. The statute makes no exception. Can the court make one? We think not. An elementary and nearly, if not quite, universal rule of law is that instruments intended to affect the title of real estate must, to be effectual, conform to the law of the state or country in which the land is situated, or be such as that law authorizes or prescribes. This proposition is, we think, too well settled to require the citation of authorities in its support. We know of no principal or authority that exempts voluntary assignments for the benefit of creditors from this rule. Nor do we know of any law which limits the right of seizure of property, which a debtor has made an ineffectual attempt to convey, to creditors who are residents of the state. Citizens of each state have all the privileges of citizens of every other state, among which, undoubtedly, are the rights to apply to the courts of the latter and to have the aid of their process for the enforcement and the collection of their demands and the protection of their persons and property.

But the payee of the notes, which were the foundation of this suit in attachment, retained them until after their maturity and proved them in the Iowa insolvency proceeding. No dividend was declared or paid in that proceeding, but *Green v. Gross*, 12 Neb. 117, is cited as authority that the bank, and also, of course, its assignee, is estopped from afterwards attacking the title to any of the property, the proceeds of the sale of which might have contributed to the fund in the distribution of which it would have participated, both because of its residence

in the state of Iowa and because of demand for such participation. We have already given briefly our reason for not being able to concur in the first of these propositions, but the second is not so easily brushed aside. An assignment in insolvency under state authority differs from a proceeding in bankruptcy under the federal statute in the important particular that it does not affect creditors compulsorily. They participate, if at all, voluntarily, and if they refrain from so doing their demands and their remedies thereon are unaffected, except to the extent that the debtor's property is lawfully withdrawn from their reach by the due operation of the insolvency laws, just as it might have been so withdrawn from any one of them by a precedent judicial seizure of it by one more diligent. But voluntary participation may have important consequences. An instance is easily conceivable in which the bulk of the property belonging to an insolvent and attempted to be assigned by him is real estate lying outside the state. Suppose that such had been the case in the present instance, and that the bank had obtained a dividend, say of 50 per cent. of its claim, from participation in the distribution of the proceeds of the sale of such foreign lands; could it afterwards impeach the title of the purchaser and obtain satisfaction of the residue of its claim by a resale of the property? Counsel for the attachment plaintiff argue that the doctrine of estoppel, whatever its force in other cases, has no application in this instance, because of the fact that no dividend was declared or paid, and cite *Thompkins v. Adams*, 41 Kan. 38, in support of this contention. But no such exception is made in this court in *Green v. Gross*, *supra*, and we think such a one would be impracticable. It would permit a creditor to speculate and experiment with inconsistent remedies; pursuing one until he became dissatisfied with it, and then abandoning it for the other, or prosecuting one until he obtained partial satisfaction, and then resorting to the other for the recovery of the remainder of his claim. Such a course would be manifestly unjust both to other credi-

tors of the insolvent and to a purchaser in good faith and for value relying upon the sufficiency of the insolvency proceedings in which the attachment plaintiff had participated.. We are of the opinion that in such cases the rule of law relative to the election of remedies is applicable, subject, of course, to its own peculiar limitations and exceptions; but as to these last no issue is made or tendered by the pleadings.

In November, 1894, the investment company executed to one Lewis, as trustee, a trust mortgage upon the lot in controversy and other property to secure the payment of certain indebtedness. The instrument purports to have conveyed to the trustee the entire title, legal and equitable, together with the right of possession of the premises described in it, with authority to sell and convey the same at private sale at his discretion, and apply the proceeds to or toward the payment of the obligation secured thereby. In the summer of 1896 there was a conference between the creditor under this mortgage and Lewis, the trustee, who was also president of the corporation, and Nelson Royal, the assignee in insolvency, at which time it was agreed that the obligation of the investment company should be satisfied and discharged upon the execution and delivery by the trustee and by the assignee, severally, of deeds of conveyance of the property in question in fee simple to one W. H. Sage, one of the predecessors in title to the plaintiffs in this suit. On the 11th day of July, 1896, the district court for Polk county, Iowa, granted an order, upon the application of the assignee, purporting to authorize him to carry the arrangement into effect, so far as he was concerned, by the execution and delivery of his contemplated deed, which he accordingly did on the 26th day of the following August; and on the 31st day of the same month, Lewis consummated the transaction by executing his deed to Sage, who then went into possession of the Omaha lot and has remained so, by himself or his tenants or grantees, until the present time. By this transaction, which appears to

have been entered into fairly, voluntarily and in good faith, considerable other property of the investment company included in the trust deed appears to have been released from the lien of that instrument and an obligation against the company of something like \$20,000 in amount to have been satisfied and discharged.

Counsel for the attachment plaintiff, defendant herein, contends that the power of private sale contained in the trust mortgage was void, and that the deed of Lewis, trustee, to Sage was therefore ineffectual; but in response to this contention several objections may be urged. The statute of this state, sec. 55, ch. 73, Comp. St. 1903, does not prohibit a conveyance of the legal title and right of possession to a mortgagee, but merely enacts that such a conveyance shall not be presumed in the absence of express stipulation (*Felino v. Newcomb*, 64 Neb. 335), and the courts have held that, even in the presence of such stipulations, the mortgagor's equity of redemption cannot be extinguished by adversary proceedings other than judicial process of foreclosure. But does this rule prevent an amicable adjustment of the debt by a voluntary release and quitclaim of the equity of redemption? Is not the equitable rule exclusively for the benefit and protection of the mortgagor and persons in privity with him in blood or by covenant? In the absence of fraud or collusion, can a stranger avail himself of it to the disturbance or impairment of an amicable settlement upon a valuable consideration, and of a state of affairs satisfactory to both mortgagor and mortgagee? Would not the mortgagor and his privies, and more certainly his attachment and execution creditors, be estopped? There is nothing in the statute, and we know of no principle of law or equity, that forbids or impeaches such a transaction, when entered into or acquiesced in in good faith, and without an intent or effect to injure or defraud creditors or third persons.

For nearly eight years before the suit in foreign attachment was begun the plaintiffs and their predecessors

had been in possession claiming ownership under both the foregoing claims of title. Nothing is alleged impeaching the good faith of either or any of them, nor is there any denial of the plain and unequivocal implications of the record that the mortgagor, the assignee in insolvency and the remaining creditors of the former, in fact, all persons interested, except the plaintiff in attachment, have, with full knowledge of all the facts, at all times acquiesced, and still do so in the transaction and in the title sought to be conveyed and assured thereby. Neither is it averred that the land in controversy was, at the time the equity of redemption was released and conveyed, of a value in excess of the amount of the obligation which, in consideration of the transaction, was released and discharged. Nor is it denied that said release and discharge were effectual. We are unable to understand upon what principle of equity the title thus intended to be conveyed to, and quieted in, the mortgagee can at this late day be disturbed.

In conclusion, it may be well to add that it is not to be inferred from the fact that the foregoing matters of substance have been considered and decided that the court countenances the practice sought to be inaugurated in this case by the issuance of a writ of assistance to put a purchaser at a judicial sale in foreign attachment into possession of real property supposed to have been sold. The writ of assistance is the process of a court of equity, and not of a court of law. The plaintiff in this court was not a party to the attachment suit, but during and before the pendency of that action was and had been in the possession of the premises claiming adversely to both the plaintiff and the defendant and to all the world. It is clear, beyond the possibility of dispute, that he was entitled to his day in court in some regular form of action at law or in equity before his title could be affected or his possession disturbed.

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We therefore recommend that the judgment of the district court be affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

MANLIUS SQUIRE, APPELLANT, v. MICHAEL H. MCCARTHY
ET AL., APPELLEES.*

FILED NOVEMBER 10, 1906. No. 14,394.

Tax Lien: FORECLOSURE: REDEMPTION. When an action by a county to foreclose a tax lien upon a tract of land has proceeded to judgment of foreclosure and sale, and a sale has in fact been had, though not yet confirmed, the tax lien has become merged in the decree, and the taxpayer's right to discharge the same by payment of the tax to the county treasurer in the ordinary way is superseded by his right to judicial redemption which must be obtained, if at all, by means of procedure appropriate thereto.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

R. R. Dickson, for appellant.

M. F. Harrington, contra.

AMES, C.

The plaintiff was the owner of a tract of land in Holt county, in this state, upon which general state and local taxes were delinquent for the years of 1897 and 1898, and in January, 1900, the county begun an action to foreclose the public lien for these taxes in the manner approved by this court in *Logan County v. McKinley-Lan-*

*Rehearing allowed. See opinion, p. 431, *post*.

ning L. & T. Co., 70 Neb. 399. Constructive service was made by publication, and the action proceeded regularly to decree, sale and confirmation, and to a deed to the purchaser who went into possession of the premises. The plaintiff did not know of the pendency of the action until after the lapse of a year and a half from the date of the sheriff's deed. Between the time of the sheriff's sale and the confirmation thereof the plaintiff paid the amount of the delinquent taxes, interest and penalties to the county treasurer, and received the usual treasurer's receipt therefor. The money for this payment was remitted by mail, and, although there was a memorandum on the tax list indicating the pendency of the action, he was not informed of it and, of course, made no attempt to redeem from the decree. The purchaser at the sale has not been reimbursed or tendered the amount of his bid, and has conveyed the premises by deed. This is an action by the former owner of the land, seeking upon the foregoing facts to attack the proceedings in foreclosure and the title thereby created, and to quiet his own title against them. There was a judgment of dismissal, and the plaintiff appeals.

Counsel for appellant admits having made diligent and extended, but wholly unsuccessful, search for authority in support of his suit, and we are ignorant of any, or of any principle upon which his action can be maintained. The jurisdiction of the court in which the foreclosure action was had is not now open to question, nor is the validity or conclusiveness of its judgment of foreclosure and sale. Without doubt, the tax lien became merged in the decree, and the plaintiff's right to pay the taxes, by ordinary methods, to the treasurer was superseded by his right to judicial redemption, which object could have been obtained only by the pursuit of such procedure as is prescribed by statute or the rules of court, or adapted to the making of redemption from judicial liens, decrees or sales. Any other course would lead to inextricable confusion, and subject titles resting upon

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such decrees and sales to such infirmity and insecurity as to render the procedure practically ineffectual.

Some attempt was made to show that the appraisement upon which the judicial sale was made was fraudulently low, but we think it was ineffectual. It is certainly insufficient to justify a collateral attack.

It is therefore recommended that the judgment of the district court be affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

The following opinion on rehearing was filed May 24, 1907. *Former judgment of affirmance vacated and judgment of district court reversed with directions:*

1. **Tax Lien: FORECLOSURE: REDEMPTION.** Before a tax sale had been had by the county treasurer, Holt county brought an action to foreclose an alleged tax lien on the plaintiff's land, which action proceeded to decree and sheriff's sale. After the sale and before the confirmation the plaintiff, in ignorance of these facts, paid to the county treasurer the full amount of the taxes and interest charged against the land. The treasurer accepted the money and issued receipts in due form therefor without notifying the plaintiff of the pendency of the action which was prematurely brought. *Held*, That the acceptance of the money by the county treasurer and the issuance of the tax receipts operated as a satisfaction of the decree so far as the plaintiff is concerned, and that he is entitled to have the sheriff's deed set aside in equity, the land being still in the hands of the original purchaser.
2. ———: ———: **EQUITY.** In such case, the loss, if any, is attributable to the negligence of the county treasurer, and the wrongful act of the county in attempting to foreclose its lien before its right to do so legally accrued, not to the failure of the taxpayer who was within his legal right and should be protected.

LETTON, J.

The plaintiff, who is a resident of Wisconsin, in 1891 became the owner of a tract of land in Holt county,

Nebraska. He has paid taxes on the same from 1892 to and including the year 1901, but he allowed the taxes for the years 1897, 1898 and 1899 to become delinquent. In May, 1900, he sent by mail to the county treasurer sufficient money to pay the taxes for each of these years, with accrued interest to date, and with one dollar extra fee for each receipt allowed by statute to the treasurer for payment of taxes by letter. In January, 1902, after he had sent the money for the payment of the taxes for 1901, he was informed by the county treasurer that the land had been assessed to M. H. McCarthy for the year 1901, and upon making further inquiry he received another letter from the county treasurer informing him that his land had been sold under tax foreclosure proceedings in 1900 to McCarthy, and that the sale had been confirmed and a deed made. He then brought this action to set aside the sale.

In January, 1900, the county attorney of Holt county began an action in the name of that county to foreclose a tax lien on the land for the delinquent taxes of 1897 and 1898. A decree was rendered on March 13, 1900, upon constructive service for \$2,782, the land was sold at sheriff's sale on May 28 for \$100.60, and on July 16 the sale was confirmed. The plaintiff sent the money to pay these taxes to the county treasurer in May, as he testifies, but the treasurer's books show that the taxes were paid on the 4th day of June, 1900, so that after the sale and before the confirmation the county had accepted, through its treasurer, the payment of the taxes and interest. The action to foreclose was improperly and prematurely brought, for the reason that at the time it was begun the county had not acquired the right to maintain it by the purchase of the land at treasurer's sale. *Logan County v. Carnahan*, 66 Neb. 685, 693. If the land had been sold at treasurer's sale for the tax of 1898 the right to foreclose would not have accrued until November, 1900, more than six months after the payment by plaintiff. So that if the usual and orderly course of tax

collection had been followed no action of this nature could have been begun until long after the time at which the plaintiff paid his taxes. By the negligence of the county treasurer the plaintiff was not notified of the pendency of the action when he paid the taxes, and was allowed to rest in apparent security until after the sale had been confirmed and a deed made to the purchaser. The title to the land has not passed from the purchaser at sheriff's sale as was erroneously stated in the former opinion, but is still held by him in his own right. The condition that presents itself then is: In whom is the superior equity? Is it with the owner of land who has paid his taxes before any sale of the land by the county treasurer upon which an action to foreclose might properly be begun, and who relied, and had the right to rely, upon the proper discharge of duty by the county officers, or is it with the purchaser at sheriff's sale under a decree which was clearly erroneous, but not absolutely void, and whose purchase was confirmed by the court after the taxes had been paid and the money accepted by the plaintiff in the suit, and without knowledge on the part of the court of such facts as would have made it improper and unjust to confirm the same? The statute makes no specific provisions with reference to the manner of redemption by landowners when proceedings are pending to foreclose tax liens, nor is any person designated who may receive money in redemption other than the county treasurer; hence, the plaintiff, when he attempted to pay his taxes, had a right to rely upon information of any foreclosure proceedings being furnished him by the officer of the county charged by law with the duty of collecting taxes. The taxpayer apparently did everything that the law required him to do. He paid to the proper officer the amount shown by the tax books that was chargeable against the land, with interest to date, and in addition paid the statutory fee which the treasurer is allowed to collect from nonresidents for the payment of their taxes, and this he did before the land had

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been sold at tax sale by the treasurer and before anyone had a right to foreclose a tax lien. On the other hand, the county brought an unwarranted action, and obtained a decree which, though not justified by the facts, was not void for want of jurisdiction, under the ruling in *Logan County v. McKinley-Lanning L. & T. Co.*, 70 Neb. 399. It was the plain duty of the county treasurer to give to the plaintiff, at the time he paid the taxes, information that such an action had been begun, and he should not be compelled to suffer on account of the nonperformance of this duty by the agent of the county. In a similar case the supreme court of Iowa has said:

"The purpose of the law, in divesting the estate of a landowner upon sales and deeds executed thereunder for delinquent taxes, is to coerce the negligent and unwilling citizens to obedience of the law in payment of their taxes. It is not directed against those who, in the exercise of proper diligence, and in good faith, attempt to obey the law and discharge their duty as good citizens by the payment of taxes levied upon their property. If the landowner pays, tenders, or in good faith and without negligence attempts to pay his taxes, and is defeated in his efforts to discharge them by the fault and negligence of the officers charged with the duty of receiving the money and making proper records thereof, a sale and deed of the property will not be enforced." *Corning Town Co. v. Davis*, 44 Ia. 622.

And so in an Illinois case, the landowner called upon the county clerk, whose duty it was to inform him of the amount necessary to be paid to make redemption and whose duty it was to receive the money. The full amount which this officer required was paid and a certificate of redemption issued, but a subsequent tax had not been included upon which a tax sale was afterwards had. The action was to set aside a deed based upon this subsequent sale. The court say: "Here was a mistake of an officer for which appellees were in no manner responsible. For this mistake shall they lose their land, or is it within

the power of a court of equity to relieve as against that mistake, and thus protect appellees in the title to their land?" *Gage v. Scales*, 100 Ill. 218. See also *Converse v. Rankin*, 115 Ill. 398; *Frceman v. Cornwell*, 15 Atl. (Pa.) 873; *Bubb v. Tompkins*, 47 Pa. St. 359; *Dietrick & Wilson v. Mason*, 57 Pa. St. 40; *Hintrager v. Mahoney*, 78 Ia. 537, 43 N. W. 522. When the officer charged with the duty of collecting the taxes took from the plaintiff the full amount of the same, with interest, and issued his official receipt, he acknowledged the settlement of the claim of the county against the land, and what was done thereafter in the legal proceedings was as much without authority as if full redemption had been made. It was the fault of the officer, not of the plaintiff, that allowed the proceedings to continue, and the plaintiff should not suffer on account of the officer's lapse. The confirmation was made by the court under a misapprehension of the facts, and is such a manifest wrong as equity will relieve against while the land is still in the hands of the original purchaser at the sale. *Sayre v. Elyton Land Co.*, 73 Ala. 85.

If full payment had been made of the taxes, interest and costs, this would have constituted a full redemption of the property and the order of confirmation would have been made without authority of law. 23 Cyc. 1495. We think, so far as the owner of the land is concerned, he is in the same situation as if he had made full payment. The order of confirmation was made without authority as against the plaintiff and he is entitled to bring this action in equity to set the same aside.

The county is not a party to this action and, hence, the equities cannot be fully adjusted as between the parties. It may be said, however, that the county is not entitled to a double payment of the taxes and the plaintiff may have recourse upon it by proper proceedings. The defendant is not shown to have been at fault in any degree, while the plaintiff's troubles would not have occurred had he paid his taxes before they became delinquent. As a

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condition of the relief, therefore, the plaintiff should be required to pay into court for the benefit of the defendant the amount of the purchase money paid for the land, with interest at 7 per cent. from the date of payment, and also the costs of this action in the district court.

The former judgment of this court is vacated, and the judgment of the district court is reversed and the cause remanded, with directions to enter a decree quieting the title to the land in the plaintiff upon his complying with the foregoing conditions.

JUDGMENT ACCORDINGLY.

WILLIAM L. CANHAM, APPELLEE, v. OTTO BRUEGMAN ET AL., APPELLANTS.

FILED NOVEMBER 10, 1906. No. 14,415.

1. **Action for Damages: PETITION: SUFFICIENCY.** In an action for damages by a vendee against a vendor of horses infected with the disease of glanders, a petition is not obnoxious to a general demurrer because of an omission of an averment that before or at the time of the sale and delivery complained of the vendor had knowledge that the animals were so infected.
2. **Statutes: REPEAL.** Section 3171, Ann. St., enacting a penalty for selling glandered horses or permitting them to run at large, was not superseded or repealed by a subsequent act to prevent the importation, selling or permitting to run at large of any domestic animal afflicted with a contagious disease, being sections 3174 to 3177 of said statutes, the latter being general in its terms, while the former has a special and particular object.

APPEAL from the district court for Knox county: JOHN F. BOYD, JUDGE. *Affirmed.*

W. D. Funk and W. R. Ellis, for appellants.

W. L. Henderson and O. W. Rice, contra.

AMES, C.

This is an action by the vendee of a team of horses against the vendors thereof to recover damages on the ground that at the time of the sale and delivery of the animals they were, without the knowledge of the plaintiff, infected with a certain malignant and contagious disease, known as "glanders," of which both of them soon afterwards died, after having communicated the disease to a certain other animal belonging to the plaintiff which, in consequence thereof, died. A general demurrer to the petition having been overruled, the defendants elected not to plead further, and the amount of the plaintiff's damages having been agreed upon by the parties, other evidence with respect thereto was waived, and the court rendered a judgment for that sum, from which the defendants appealed.

The statute, section 3171, Ann. St., enacts: "It shall not be lawful for any person to use, let, sell, or permit to run at large any horse, mule, or ass diseased with glanders. Any person violating the provisions of this section shall pay a fine of not less than five nor more than fifty dollars, and shall be liable for all damages." The sole ground for the contention that the petition does not state a cause of action is that it omits to aver that before or at the time of the sale and delivery of the horses the vendors had knowledge of their diseased condition. The statute quoted, which contains no express exception and has reference to but one disease, was passed in 1867 and has never, unless by implication, been repealed. In 1883 another act was adopted, making it a misdemeanor punishable by fine and imprisonment to import into the state, or to sell, transfer or to permit to run at large, any animal infected with any infectious disease, and rendering any person *knowingly* violating any of the provisions of the act liable in a civil action for all damages resulting from such violation. It is argued that the two acts are not necessarily in conflict, the later of them being gen-

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eral in its scope and having reference to all animals and to all infectious diseases, while the former is special and specific, both as to a single disease and with respect to the animals subject to infection with it, and, hence, it is inferred that the legislature intended a different and more absolute rule of liability in cases of glanders than is imposed by the later enactment. However this may be, we think that under the liberal rules of pleading and procedure provided by the code, a petition in such a case is sufficient if it alleges the cause of action in the language of the statute. Knowledge, in the absence of all other evidence, may well enough be inferred by the court and jury, as it would be by most other persons, from the commission of the prohibited act. And the rule in such cases is that, in a civil action, it is sufficient to declare in the language of the act, unless there is an exception which the plaintiff is required to negative.

We recommend that the judgment of the district court be affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

LOUISA LARSON, ADMINISTRATRIX, APPELLANT, v. THOMAS
L. SLOAN, APPELLEE.

FILED NOVEMBER 10, 1906. No. 14,453.

Appeal: FINAL ORDER. An order sustaining a general demurrer to a petition, not followed by a judgment of dismissal or other final disposition of the case, is not a final order or judgment, and is not reviewable in this court.

APPEAL from the district court for Thurston county:
GUY T. GRAVES, JUDGE. *Affirmed.*

E. J. Smith and R. G. Strong, for appellant.

Curtis L. Day, contra.

AMES, C.

This is an action to recover damages on an appeal bond given in a forcible detainer suit, in which the appellant failed upon his appeal. There was a general demurrer to the petition in this case which was sustained, but at a subsequent term of court, and before any other steps of importance had been taken in the cause, the court, upon application and notice to the defendant, granted a rehearing upon the demurrer, and after further consideration, and at a still subsequent term, overruled it. The defendant declined to appear further in the case by pleading or otherwise. The court afterwards, and presumably after hearing proof in the cause, rendered a judgment for the amount prayed in the petition, with interest, and costs, and the defendant appealed to this court.

No motion for a new trial was made in the lower court and no bill of exceptions was filed or prepared. In this court the defendant criticises the petition somewhat, rather for uncertainty than for insufficiency of statement, but in so far as it is defective, if it is so at all, its deficiencies were capable of being supplied by proof admitted without objection, and we are bound to presume that the evidence sufficed in that regard, and do not feel called upon to discuss the matter further. Indeed, counsel for the defendant, who submitted his case without oral argument, treated this branch of it in a few brief and, to our minds, somewhat obscure paragraphs, the full purport of which we, perhaps, do not fully understand.

His main contention is that the order sustaining the demurrer to the petition was a final order or judgment, over which the court lost control with the adjournment of the term at which it was made, so that after that event it was reviewable only by proceedings in error in this

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court, and that the order at a subsequent term vacating it and overruling the demurrer, and the still subsequently rendered judgment, from which he appeals, were both, for that reason, without jurisdiction in the court to render them and are void. His brief contains an able and exhaustive criticism and review of the decisions of this court, beginning with *Smith v. Sahler*, 1 Neb. 310, and *Sprick v. Washington County*, 3 Neb. 253, which are the origin and foundation of the contrary practice, and which, as he considers, besides having been rendered in ignorance of or inadvertence to the true rule of law, have since then been the subject of unwarranted inference by the bench and profession. Granting, for the sake of the discussion, or rather for the purpose of evading a discussion, the justice of his strictures, we are of opinion that less harm will be likely to result from adherence to a mistaken view of the law than would arise from a sudden and radical change of an important rule of practice that has been universally acquiesced in for nearly 40 years.

We are therefore of opinion that the judgment of the district court is right, and recommend that it be affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

**JAMES A. STONE, APPELLANT, V. MARY C. SNELL ET AL.,
APPELLEES.**

FILED NOVEMBER 10, 1906. No. 14,455.

1. **Vendor and Purchaser: OPTION.** A mere option for the purchase of land, indeterminate as to time and accompanied by a deed deposited in escrow, is terminable at any time upon reasonable notice by the vendor.
2. ———: **LEASE.** A vendee of land in the possession of a tenant takes the title subject to the unexpired term.

APPEAL from the district court for Greeley county:
JAMES N. PAUL, JUDGE. *Affirmed.*

H. C. Vail, for appellant.

John Kavanaugh, J. R. Swain and T. J. Doyle, contra.

AMES, C.

Godkin owned a farm which was incumbered by several mortgages, and which he contracted on the 8th day of November to sell to Stone for an agreed purchase price, out of which the mortgages were to be paid. A written memorandum of the contract did not specify when the transaction was to be completed, but it seems to have been stipulated or understood that it was not so to be until releases could be procured and the mortgages discharged, so as to clear the title to the land. Godkin executed a deed and deposited in escrow with Green, to be delivered to Stone when the transaction should be in other respects consummated, and removed to the state of Idaho, where he took up his residence. There were some obstacles and delay in computing the amount of the liens and procuring releases, so that the purchase price was not paid nor the deed delivered until the 10th day of the following March. In the latter part of January

Godkin became apprehensive that the sale would fall through and that he would lose the use of the land for the then ensuing season. He therefore notified Green, who held the papers in escrow, that he should lease the premises if the sale should not be perfected on or before the first of March following, and also wrote to his agent, Lanigan, that if the sale was not concluded by the first day of March the latter should rent the land for the ensuing year, and Lanigan accordingly did rent it to one Snell, and put the latter in possession of it and of the buildings. A part of the land had been sowed to fall wheat, and the tenant, as a part of the leasehold agreement, refunded to Lanigan \$16, the cost of the seed wheat used in the sowing. This money Lanigan afterwards returned to Snell, saying that he preferred not to remain responsible for it, and that the latter should pay it to Godkin or to whomsoever should be shown to be entitled to it. Parrot, after the deed was delivered, undertook to dispossess Snell by putting his furniture out of the house, and by cultivating some of the land himself, and by beginning in the name of the purchaser an action in forcible detainer which was prosecuted to a final judgment in favor of the defendant. He also begun and prosecuted to an adverse conclusion a suit in equity to restrain the tenant, who had reoccupied the house, from occupying and cultivating the land, on the ground that the latter was a trespasser in so doing. Finally, this suit was brought by the purchaser, Stone, to recover in replevin the above mentioned crop of wheat and also a crop of oats sown by his agent, Parrot. The case was tried to the court without the intervention of a jury, and resulted in a general finding and a judgment in favor of the defendant, from which the plaintiff has appealed.

The foregoing facts are established without substantial conflict of the evidence, and leave in our minds no doubt of the correctness of the judgment appealed from. Unquestionably Godkin had, at the time the lease was entered into, the title and the actual or constructive pos-

session of the premises. He had notified the purchaser, through their mutual agent, Green, that, in effect, he should regard the negotiation at an end and the agreement to sell as rescinded, unless the transaction should be consummated by the first of March. Our attention has not been called to a copy of the memorandum in the record, but counsel do not contend that he had not a right so to do. The conduct of the parties leads directly to the inference that what the plaintiff had was an option to purchase, which was indeterminate as to time, and from which either was entitled to withdraw upon reasonable notice at any time. It is said that the lessee was cognizant of all the facts. If so, he was cognizant of this fact among others. Godkin therefore had a right to make the lease at the time he did make it, and when, afterwards, the purchaser accepted the deed he took it subject to the term. Whether the conveyance operated as an assignment of the rent it is not now necessary to decide. Neither is it requisite to determine what was the effect of the adjudications in the former litigations, since both terminated in favor of the present plaintiff. If the memorandum had been of such a character as to amount to an executory contract of sale conveying an equitable title, a different question would have arisen, but, aside from the conduct of the parties, the fact that it stipulated no specific time of performance is a circumstance strongly indicative that it was not such. From what appears upon the face of the record, the plain inference is that the negotiation was at an end on the first day of March. When, on the 10th of the month, it was resumed on the part of Stone by his payment of the purchase money and acceptance of the deed, the tenant was in possession, and the purchaser had at least constructive knowledge of that fact. The rights of the tenant were not therefore affected by the transaction. To what extent, if any, the vendor became obligated by acceptance of the purchase price and acquiescence in the delivery of his deed of warranty is a question not now presented for

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decision. We are satisfied that the judgment is right, and recommend that it be affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

THOMAS LANGAN, APPELLANT, V. VILLAGE OF WOOD
RIVER ET AL., APPELLEES.

FILED NOVEMBER 10, 1906. No. 14,480.

Liquor License: POWER OF VILLAGE TRUSTEES. It is competent for a board of village trustees to provide by ordinance for a trial, before themselves, of a complaint against a saloon-keeper for alleged violation of the regulations of the statute and ordinances with reference to the sale of intoxicating liquors, and upon his conviction, as a result of such trial, to revoke his license.

APPEAL from the district court for Hall county: JAMES R. HANNA, JUDGE. *Affirmed.*

O. A. Abbott, for appellant.

Charles G. Ryan, contra.

AMES, C.

Plaintiff procured from the trustees of the village of Wood River a saloon license for the municipal year, 1905, and engaged in the traffic of retail liquor dealer thereunder. An ordinance in force in the city at the time enacted that the license should be revoked if the licensee or any of his employees should enter the room in which the business should be conducted on any day between certain hours, or if he should be guilty of violation of certain other regulations of the traffic made by the statute or by the ordinance. Another ordinance provided that, upon

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complaint having been made and filed with the trustees of any such violation by the licensee or his servant, notice thereof should be given him of a time and place when and where witnesses would be examined and an investigation made as to the truth of the accusation, and that if the latter should be established the license should be revoked. Such a complaint against the plaintiff was filed with the board and notice thereof served upon him, in response to which he appeared before them, and by agreement the matter was set down for hearing at a then future day; but before the arrival of that date the board was restrained by a temporary injunction, issued out of the district court, from further proceeding. Subsequently a general demurrer to the petition in the injunction suit was sustained and the action dismissed. From the judgment of dismissal the plaintiff prosecutes this appeal.

The only material issue raised by the demurrer is whether the ordinance assuming to confer upon the board jurisdiction to hear, try and determine the question of violation and forfeiture is valid, or, in other words, whether the exercise of the functions involved in such a proceeding have been, or could have been, conferred upon the board of trustees by the village charter. This question was set finally at rest by *Miles v. State*, 53 Neb. 305. The statute, the ordinance, the material facts and the procedure in that case were substantially identical with those in this, and the contention of the plaintiff in error (appellee here) was upheld. It is therefore recommended that the judgment of the district court be affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

WILL A. CORSON V. MARY LEWIS ET AL.*

FILED NOVEMBER 10, 1906. No. 14,006.

1. **Attorney and Client: CONTRACT: ASSIGNMENT.** A contract for legal services is personal in its nature and cannot be assigned by one party without the consent of the other.
2. ———: ———: **ANNULMENT.** Death or disability, which renders the performance of such a contract impossible, annuls the contract.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Will A. Corson and Cooper & Dunn, for plaintiff in error.

John L. Webster, contra.

OLDHAM, C.

On May 14, 1900, Mary Lewis instituted an action in the district court for Douglas county, Nebraska, against the Omaha Street Railway Company to recover damages for personal injuries. The suit was filed by Will A. Corson, an attorney of Douglas county, and the proposed intervener in this cause of action. After the suit was filed a demurrer was interposed to the petition by the street railway company and was sustained by the district court. Mr. Corson then employed George W. Cooper, Esq., to assist in the prosecution of the case, and on January 16, 1901, an amended petition was filed, and issues were joined thereon. While the cause was pending, negotiations for a settlement of the claim were had between Mr. Corson, as attorney for the plaintiff, and Honorable John L. Webster, as attorney for the defendant. While these negotiations were pending, in April, 1902, Mr. Corson became temporarily mentally deranged from nervous pros-

*Rehearing allowed. See opinion, p. 449, *post*.

tration, and was placed in a private sanitarium for treatment, and was treated at different sanitariums without the state until August, 1903, when his health was restored and he returned again to Omaha and reengaged in the practice of his profession. During the time Mr. Corson was receiving treatment his office was closed, and all his books and papers were removed to his residence within the city. Before instituting the suit for Mrs. Lewis, Mr. Corson had entered into a written contract with her husband, who assumed to act as her agent, by the terms of which Mr. Corson was to receive one-half the money procured on the claim either by compromise or judgment, and plaintiff was to pay the costs of litigation. When Mr. Corson was taken away for treatment, Mr. Cooper went to the court in which the cause was pending, and had his name entered as of counsel for the plaintiff, and procured a continuance of the case on account of the absence of Mr. Corson who was the managing counsel. In the meantime Mr. Howe G. Corson, brother of the proposed intervener, requested John W. Parrish, Esq., to look after whatever legal business had been in the hands of his brother, and on October 30, 1902, Mr. Parrish, acting alone and on this suggestion, and without any conference or communication with Mr. Will A. Corson, as appears from his testimony, filed in the cause then pending a notice of attorney's lien, as follows: "To the Omaha Street Railway Company, and all other persons concerned: Notice is hereby given that W. A. Corson, attorney for plaintiff in the above entitled action, claims a lien herein for one-half ($\frac{1}{2}$) of the amount of whatever judgment is recovered and entered in this suit. W. A. Corson, Atty. for Plff., by John W. Parrish, his agent and attorney."

In September, 1902, and about five months after Mr. Corson's illness began, Mrs. Lewis, being wholly unable, as she said, to confer with her attorney, and having learned that his office was closed and that he was in an asylum for treatment, communicated through Mr. Neary with T. J. Mahoney, Esq., and requested him to enter into

the prosecution of her suit and conduct it to judgment or final settlement. Mr. Mahoney, knowing the condition of Mr. Corson's health and believing that he was permanently disabled from practicing his profession, called upon Mr. Cooper, who had been making an unsuccessful effort to find the office files in the case, and the list of witnesses that Mr. Corson had in his possession, and to get ready to try the case, if necessary, to save it from being dismissed, and Mr. Cooper turned the matter over so far as he was concerned to Mr. Mahoney. Mr. Mahoney also called upon Mr. Parrish to inquire if he had any connection with the case, and Mr. Parrish explained that he had none, and that all he had done was to file a notice of a lien for Mr. Corson, as above set out. Mr. Mahoney thereupon proceeded to effect a settlement of the cause, and compromised the claim for \$1,200, and in conformity with the stipulation between the parties the cause was dismissed on the 3d day of February, 1903. Mr. Mahoney settled with Mr. Cooper for the services he had rendered, paying him \$100 therefor and taking a receipt for his claim for services rendered. At the second term of court after the judgment of dismissal was entered, Will A. Corson filed a motion to set aside the judgment, as having been entered into collusively and in fraud of his rights to an attorney's lien on the money received on the compromise, and also asked leave to file an intervening petition for the determination and enforcement of his lien. His application was tried on affidavits and counter-affidavits, and the motion was overruled and leave to file an intervening petition was denied by the district court. To reverse this judgment the proposed intervener brings error to this court.

It is only fair to the professional standing of all the attorneys involved in this controversy to say that there is not a syllable of testimony in the record that even remotely tends to show any collusion or fraud on the part of any of them in procuring a settlement of the claim.

They each appear to have acted with professional courtesy and strict integrity in the matter.

It is a principle universally recognized in the courts that a contract for legal services is personal in its nature, and consequently unassignable, and that death or disability, which renders performance impossible, discharges the contract. Now, there is no dispute in the record as to the fact that Mr. Corson, before either procuring a judgment or settlement of the claim, was unfortunately disabled by disease from performing his duties as plaintiff's attorney, and as he was without authority to assign his contract to anyone else, the contract was annulled, and Mrs. Lewis was fully justified in procuring other counsel to protect her interests in the suit. As there is no valid claim for services existing in favor of the proposed intervenor and against his client, no lien could attach to any money received in settlement of the claim. In this view of the matter it is unnecessary to express any opinion on the other questions discussed in the briefs. We therefore recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed December 18, 1907. *Former judgment of affirmance, as modified, adhered to:*

1. **Attorney and Client: DISABILITY: ACTION.** If the party to an entire contract for personal services, who is to render the service, becomes, by reason of physical disability, through no fault of his own, unable to perform the same, the contract is discharged, but he may recover the reasonable value of his services rendered upon a *quantum meruit*.
2. **Attorney's Lien.** An attorney may have a lien upon the claim of his client in an action for personal injury.

3. **Intervention After Dismissal.** Where a settlement has been made between the parties to an action and the action dismissed after notice of an attorney's lien has been given, the attorney may, in a proper case, move to set aside the judgment of dismissal and be allowed to intervene as a party plaintiff to establish his lien.
4. ———: **REVIEW.** Under the facts set forth in the opinion, *held* that the order of the district court refusing to set aside the order of dismissal and to allow a hearing upon a petition in intervention was not erroneous.
5. **Former opinion adhered to, save as modified by paragraph one of the syllabus.**

LETTON, J.

This is an action for personal injuries. A contract was made by the plaintiff, Lewis, with the intervener, Corson, for legal services. The case was settled by the parties and judgment of dismissal was entered. Corson now seeks to reopen the case to establish an attorney's lien which he asserts against the defendant. A full and detailed statement of the facts in the case may be found in the former opinion by Mr. Commissioner OLDHAM, *ante*, p. 446.

In the former opinion the principles are laid down that a contract for legal services is personal in its nature, and consequently not assignable, and that death or a disability, which renders performance impossible, discharges the contract; that therefore, since Corson, before procuring a judgment or settlement of the case, was disabled by disease from performing his duties as attorney for plaintiff, the contract was annulled; that he had no valid claim for services performed against his client and therefore no lien could attach. We have no fault to find with the holding that a contract for legal services is personal in its nature and nonassignable, or that disability discharges such a contract. We think, however, that, if a disability occurs after a special contract for services has been partly performed, this does not prevent the disabled party, if the breach of the contract was made through no fault of his own, but by the act of God or unavoidable casualty,

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from recovering upon a *quantum meruit* for the reasonable value of the services rendered prior to the disability. This is the more modern rule, and we think is founded upon right and justice. *Coe v. Smith*, 4 Ind. 79, 58 Am. Dec. 618; *Parker v. Macomber*, 17 R. I. 674, 16 L. R. A. 858, and note; *Johnston v. Board of Commissioners*, 78 Pac. (N. M.) 43. This court has gone even further. In *Murphy v. Sampson*, 2 Neb. (Unof.) 297, it was held that, when services were rendered under a contract, a party breaking the same may recover the value of the services rendered before the breach, less such damages as the employer may have sustained by reason of the breach.

It is contended that the lien which was filed was not sufficiently specific or particular to give the defendant notice that the lien was claimed upon anything but a judgment which might be rendered. The notice was that the attorney claimed a lien for one-half of "whatever judgment is recovered," and it is said, since no judgment was recovered, no lien can be asserted. We think this is carrying refinement to excess. The object of the notice was to give the defendant knowledge that the attorney claimed one-half of any money which the plaintiff was entitled to recover from the defendant upon the cause of action, as a recompense for his services as attorney. As a matter of fact, the notice proved effectual to do this, because the record shows that Mr. Webster, the attorney for the defendant, spoke to Mr. Parrish, who had acted for Corson in the filing of Corson's lien, of the existence of Corson's claim, and to Mr. Mahoney, who succeeded Corson as attorney for Mrs. Lewis. We do not think that the law contemplates that parties can come together and settle pending actions in such a way as to deprive an attorney of his right to compensation, when both know that he makes such a claim and has given notice of it." *Cones v. Brooks*, 60 Neb. 698.

It is objected, further, that the lien was not filed until after Corson had ceased to be the attorney for Mrs. Lewis, and after Mr. Mahoney had been employed. It is suffi-

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cient to say it was filed before the settlement and in sufficient time for the attorney for the defendant to ascertain its existence. It is said that the filing of the notice of the lien was not authorized, and that, since the settlement was consummated before its ratification, it cannot affect the parties. Under the circumstances any act which was taken by Mr. Corson's friends or relatives in his behalf, which was afterwards ratified by him, is as effectual as if it had originally been performed by himself or by his express direction. As soon as he learned of Mr. Parrish's act in filing the lien, which was soon after his return to the state, he approved the action, and in seeking to avail himself of any benefits which its filing may confer upon him he again ratifies and adopts Parrish's act as his own and his ratification relates back to the original time of filing. It is claimed that Corson has no standing in court without Mrs. Lewis having been brought in and made a party to his petition in intervention; that in no event could he recover from the defendant more than Mrs. Lewis might be indebted to him, and that in the ascertainment of that amount Mrs. Lewis is a necessary party. In answer to this, it is said Mrs. Lewis is insolvent, and that, since whatever sum might be recovered by him for his services against her must necessarily be paid by the defendant, the street railway company is the only real party in interest, and the value of the services can as well be ascertained without her as if she were a party to the proceeding. This is the view taken by the supreme court of Kansas in *Kansas P. R. Co. v. Muhlman*, 17 Kan. 224, and seems a sufficient answer to the argument.

It is strongly contended that the action being one not arising out of contract, but to recover damages for a personal injury, and the claim not having been reduced to judgment, the right to a lien does not exist. We are aware that many courts are committed to the doctrine that parties to suits for personal injuries may settle or compromise such actions between themselves without reference to whether services have been rendered to the plaintiff by at-

torneys, for which no compensation has been given, and regardless of whether a contract for fees based upon the amount of recovery exists, and notice has been given to the defendant of a claim under such contract. Some of these decisions are based upon the common law doctrine of the nonassignability of causes of action for injuries to the person, and others upon the language of the particular statute under which the charging lien is claimed. Among these cases are *Weller v. Jersey City, H. & P. Street R. Co.*, 66 N. J. Eq. 11, 57 Atl. 730; *Randall v. Van Wagenen*, 115 N. Y. 527; *North Chicago Street R. Co. v. Ackley*, 171 Ill. 100; *Anderson v. Itasca Lumber Co.*, 86 Minn. 480. In the last mentioned case, the supreme court of Minnesota held, under a statute the same as that of Nebraska, that a statutory lien would not apply in such a case as this prior to the rendition of a judgment and the ascertainment thereby that there actually was "money in the hands of the adverse party belonging to his client." This case sought to distinguish the case of *Smith & Baylies v. Chicago, R. I. & P. R. Co.*, 56 Ia. 720, on the ground that in that case a judgment had actually been rendered against the defendant; but this seems to be an error, the judgment mentioned in the opinion being one against the client for the amount of the fee charged. The language of the opinion of the Iowa court indicates that the settlement between the parties was made before judgment. This case holds that, under a statute like ours, an attorney may assert a statutory lien in an action for injuries to the person. In an opinion by Judge Brewer, under a statute which reads: "An attorney has a lien for a general balance of compensation * * * upon any money due to his client, and in the hands of the adverse party, in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party"—it was held in a personal injury case where notice of a lien was given and before final judgment, there having been a settlement of the case and a dismissal, that the attorney may maintain a separate action to recover the amount due

on the lien and his client is not a necessary party to such action. *Kansas P. R. Co. v. Thacher*, 17 Kan. 92. In *Abbott v. Abbott*, 18 Neb. 503, this court held that an attorney's lien could not be had under our statute before judgment in a cause of action for a personal tort which abates by death; the reason evidently being that, since such a right of action was nonassignable at common law, no claim could be made to a part of it by agreement of the parties. But as our statute provides that pending actions in cases of the nature of the present one do not abate by death, the holding of that case does not bind us in this. We prefer to follow the courts of Kansas and Iowa in holding that in a pending cause of this nature notice of an attorney's lien properly given binds the defendant so that a settlement between the parties and payment, before judgment, will not operate to defeat the attorney's right.

The point in the case which has given us the most difficulty is one which is, to some extent, discussed in the original brief of the defendant. It appears that after Mr. Mahoney took charge of the case for Mrs. Lewis and negotiations of settlement were pending between Mr. Webster and him, Webster stated to Mahoney that Mr. Cooper claimed some interest in the case, and that Mr. Parrish also claimed to represent Mr. Corson, and that he, Webster, wished to have a final and complete settlement so that all the parties would be satisfied. Mr. Webster also, on two occasions, spoke to Mr. Parrish on the street regarding the case, and mentioned the fact to him that Mr. Mahoney now appeared for the plaintiff, and suggested that if Mr. Parrish claimed any interest in the case for Mr. Corson he had best confer with Mr. Mahoney about it before the settlement should be completed. As to these facts there is no conflict in the testimony. Mr. Parrish testified that he, on one or two occasions, had some conversation with Mr. Webster regarding the case, or a possible settlement thereof, and was advised by Mr. Webster that Mr. Mahoney claimed to represent Mrs. Lewis, and that he was endeavoring to negotiate a settlement, and

suggested to Parrish to confer with Mr. Mahoney about the matter; that he did not do so, but that he did talk with Mr. Cooper of the talk he had with Mr. Webster. Under this state of facts, where the attorney for the street railway company used every effort to apprise all of the parties concerned as attorneys in the case, or who had been thus concerned, of the fact that a settlement was about to be made and of his desire to make a final and complete settlement, and after he had spoken to the attorney who had acted for Mr. Corson in the filing of the notice of the lien, and who Corson states in his brief, and testifies, was authorized to file the lien, and also duly authorized to carry on or settle the case, and who was apparently the only person besides Mr. Cooper who was interested in the case or who had apparent authority to act for Mr. Corson, and suggested a conference with Mr. Mahoney, the then attorney for the plaintiff, we think it would be unjust and improper to hold the defendant liable because of its settlement of the case after having in good faith done everything in its power to advise and notify all parties concerned. If either Mr. Cooper or Mr. Parrish had notified Mr. Webster that Corson still claimed an interest in the matter, or that if he, Webster, settled the case it would be at his client's peril, the defendant would not have been placed in the position in which it now is. We think that Mr. Webster had a right to rely upon the fact that neither Mr. Cooper, who had been associated with the intervener in the conduct of plaintiff's cause, nor Mr. Parrish, who had acted for intervener as agent or attorney in the filing of the lien and who had authority to settle the case, desired to assert, or did assert, any claim of any kind in behalf of Mr. Corson, and was justified in believing that, since no claim was made, it was intended to waive it as against the defendant. Taking this view of the case, while we adhere to the legal principles stated in the former opinion and in the syllabus that death or disability, which renders the performance of a contract for legal services impossible, annuls the contract, and while we are of the opinion that

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in such case the disabled party may recover the value of the services actually performed under the contract upon a *quantum meruit*, still we think that the defendant was justified in settling the case, under the circumstances, and that the intervener is estopped by the failure of his agent to assert himself in regard to the matter. The intervener cannot accept the benefit of Parrish's actions so far as they are beneficial to him, and disaffirm his acts or omissions in so far as they operate to his detriment.

The opinion in the former case is adhered to, as modified by the foregoing.

AFFIRMED.

CONTINENTAL LUMBER COMPANY, APPELLEE, v. MUNSHAW
& COMPANY, APPELLANT.

FILED NOVEMBER 10, 1906. No. 14,471.

1. Directing Verdict. Where there is competent testimony tending to support a defense properly pleaded, it is error for the trial court to direct a verdict for the plaintiff.
2. Question for Jury. When the intention of a party is to be ascertained from disputed or ambiguous circumstances, the necessary inferences to be drawn are for the determination of the jury. *Langan v. Whalen*, 67 Neb. 299, followed and approved.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Reversed*.

A. H. Murdock, for appellant.

E. R. Leigh, *contra*.

OLDHAM, C.

This action was originally instituted in the county court of Douglas county by the plaintiff, Continental Lumber Company, against the defendant, Munshaw & Company, to recover the remainder alleged to be due on a car-load of lumber, shipped F. O. B. to defendant at South Omaha,

Nebraska. Defendant answered, admitting that it had ordered a car-load of No. 2 shiplap lumber from plaintiff at the price per thousand feet alleged in plaintiff's petition; that, when the lumber was received and inspected, about half the load was under grade and in a damaged condition; and that for this reason defendant refused to receive the lumber, and so notified plaintiff, and still held the lumber subject to plaintiff's order. Each and every other allegation in plaintiff's petition was denied, and defendant asked judgment on a counterclaim for the amount of freight paid before the lumber was inspected. Plaintiff replied with a general denial, and alleged that, defendant having filed a claim for damages for the inferior condition of the lumber shipped, it was by that act estopped from a rescission of the contract of purchase. At the trial in the county court defendant had judgment, but on an appeal to the district court, where the same issues were tendered, the court, after the testimony was all in, directed a verdict for the plaintiff, and entered judgment on the verdict. To reverse this judgment defendant has appealed to this court.

As a verdict was directed for plaintiff, our attention must be directed to the answer filed and the evidence offered by the defendant in support thereof; and, as the answer on its face shows a sufficient reason for the rescission of the contract, we will pass to a consideration of the testimony offered. The plaintiff alleged that the order was made subject to the rules of inspection of the Southern Lumber Manufacturers' Association, and that these rules were in general use, and known to and acquiesced in by all retail lumber dealers. Defendant denied this allegation, however, and offered evidence tending to show that the lumber was ordered by Mr. Munshaw, a member of the defendant firm, from one of plaintiff's traveling salesmen, with the agreement that the lumber was to be up to the grade of that of other associations; that he (Munshaw) refused to sign any written order for the lumber, which might contain conditions that he did not understand; that

under this arrangement he ordered two car-loads of boards and one carload of No. 2 shiplap; that the two car-loads of boards arrived first, and were unloaded and found to be according to the representations, and that defendant accepted the same; that, when the third car arrived, and after defendant's foreman had paid the freight, which was required by a rule of the railroad company at South Omaha before an inspection was permitted, the lumber was unloaded, and, on an inspection, over half of it was found to be of a very inferior quality and below the grade of No. 2 shiplap. The evidence of lumber dealers in Omaha was also introduced in support of defendant's claim that the lumber was under grade. When the lumber was received, after its inspection, defendant sent the following communication to plaintiff: "South Omaha, Neb., Dec. 17, 1903. Continental Lumber Co., Houston, Tex. Gentlemen: We have just unloaded car No. 2,210 M., K. & T. and find 592 pcs. 8" 14' shiplap, and 589 pcs. 8" 12' shiplap in very bad condition, so badly blued they are almost rotten. Will have to charge you back \$3 per M on above number of pieces or 10,237 ft. and make a claim of \$30.71. Kindly send us credit memorandum for same. We have piled this stuff up separate, and would be glad to show it to anyone you might send to see it. Very respectfully, Ed Munshaw & Co."

In response to this letter plaintiff, on December 19, 1903, wrote to the defendant the following: "Your favor of the 17th, and we are surprised that you would make such a modest claim on a single car of lumber, as you desire to make against car M., K. & T., 2,210. We are not agreeable to the claim you file and you will therefore hold the entire shipment intact—subject to our order, unless you are prepared to pay for the same as invoiced. We will send an official inspector right up to Omaha, Neb., to investigate the matter." Mr. Munshaw testifies that on the receipt of this letter defendant piled all the lumber received in the car in dispute in separate piles in its yard, and still holds it there subject to plaintiff's

order. On December 22, 1903, defendant wrote to plaintiff, as follows: "Yours of the 19th at hand. We are not surprised in the least that you are not agreeable to the claim that we made on car No. 2,210 M., K. & T., as there certainly must be something very wrong in a concern shipping stuff of this kind, if they knew the condition in which it was in. We have the stuff piled up in our yard, and will welcome an official inspector to investigate the matter."

In reply to this communication plaintiff wrote, under the date of December 24, as follows: "Yours of the 22d relative to M., K. & T. car 2,210, and have forwarded both copy of complaint and invoice to Mr. Geo. K. Smith, Sect'y, S. L. M. A., with request to have official inspector call on you at once and inspect this shipment. We understand from your letter that you are agreeable to making settlement on the result of this inspection."

On January 6, 1904, defendant answered this letter, saying: "Your official inspector has not as yet shown up to investigate contents of car No. 2,210 M., K. & T. Kindly attend to this matter at your earliest convenience, and oblige." Shortly after this communication an inspector, named Warren, arrived in South Omaha, and examined the lumber and made an official report, in which he found 862 feet of same below grade, and that defendant was entitled to a reduction of \$1.73 on the purchase price of the lumber. On receipt of the report of the inspector, plaintiff, under the date of January 16, wrote to defendant informing it of the inspector's report, notifying it that it had been allowed the discount awarded, and that under the rules of the association the cost of the inspection had been \$18.45, of which defendant was entitled to pay \$16.90, and that plaintiff would pay the remainder. The letter requested a remittance of the remainder due under the inspector's report. In answer to this communication defendant, on January 21, 1904, sent the following letter to plaintiff: "We are in receipt of yours of the 16th inst., answering, we beg to advise you that the contents of car

2,210 M., K. & T. is piled in our yard, subject to your disposition. We absolutely refuse to accept this car, only on conditions named in ours of Dec. 17th." From this correspondence the learned trial judge appears to have held that the defendant, with full knowledge of all its rights and remedies, elected to affirm the contract and abide by a settlement under the rules of the association, and that, having so elected, it is bound by its election.

The printed rules of the association were admitted in evidence, and contained, among other things, the requirements for the inspection of different grades of lumber. But there is no printed rule which binds the seller and purchaser to abide by an official inspection when one is made. Mr. Warren testified that, so far as he knew, settlements were generally made according to the report of the official inspector, but this is as far as his testimony goes. He also testified that, when he began the inspection, Mr. Munshaw, acting for the defendant, objected to the inspection, and told him that he would not be bound by it, and that unless the company would accept the proposition contained in the letter of December 17, 1903, he would not accept the lumber. Now, the question arises whether or not this correspondence and all other facts and circumstances connected with the transaction clearly and conclusively show that defendant, with full knowledge of the rules of the Southern Lumber Manufacturers' Association, intended to abide by the official inspection of the lumber under such rules.

One reasonable interpretation of this correspondence between plaintiff and defendant might be that, on the receipt of the lumber, defendant objected to the quality and offered to take it, not at the schedule price, but at a considerable discount; that, when the plaintiff received this notice, it directed defendant to hold the entire car-load subject to plaintiff's order, and also informed the defendant that an inspector would be sent to investigate the condition of the lumber. It might be contended that the correspondence up to this point shows that plaintiff had

elected to rescind the contract of sale rather than pay the damages claimed by the defendant, and that the next letter from defendant showed that it was willing that plaintiff should send an inspector to verify its statement as to the condition of the lumber, but that this letter contained no agreement on the part of defendant to abide by the decision of the inspector. The reply to this letter by the plaintiff shows that plaintiff expected defendant to abide by an official inspection; but, when the inspector came, it is in evidence that defendant notified him that it would not be bound by the inspection, and that, when the inspection was made, defendant utterly repudiated it and rescinded the contract unless plaintiff would settle according to defendant's first offer. We do not intend to be understood as holding that there is no evidence in the record tending to support plaintiff's claim. What we do say is that there is competent evidence in the record to support defendant's theory of the case, and that in this state of the record the question of the intention of the parties at the time the inspection was agreed upon was a question of fact that should have been submitted to the jury under proper instructions. In *Langan v. Whalen*, 67 Neb. 299, the rule is laid down that, "when the intention of a party is to be ascertained from disputed or ambiguous circumstances, the necessary inferences to be drawn are for the determination of the jury." Applying this rule to the facts and circumstances surrounding the transaction herein, we think that the learned trial judge erred in declaring, as a matter of law, that defendant, with full knowledge of all its rights, had elected to abide by its contract of purchase and submit its dispute as to damages to the final determination of an official inspector of the Southern Lumber Manufacturers' Association. We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and EPPERSON, CC., concur.

Godfrey v. Cunningham.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

DENNIS GODFREY, APPELLANT, v. ANNA CUNNINGHAM,
APPELLEE.

FILED NOVEMBER 10, 1906. No. 14,447.

1. **Partition: SALE: CONFIRMATION.** After the filing of a stipulation signed by the attorneys of both parties, agreeing that an order of sale in a partition case and all proceedings thereunder be vacated, a confirmation of such sale without a consideration and disposition of the stipulation is an irregularity within the meaning of section 602 of the code.
2. ———: ———: **MOTION TO VACATE.** In a motion to set aside the confirmation of a judicial sale for irregularities under the provisions of section 602 of the code, it is sufficient to allege the existence of irregularities which would have been sufficient to avoid the sale had they been considered at the time of confirmation.
3. **Interlocutory Orders: VACATING.** "An interlocutory order or ruling may be reversed and vacated at a subsequent term by the same court, without compliance with the provisions of section 602 *et sequitur* of the code, relating to the vacation and modification of judgments and final orders at a term subsequent to that in which rendered." *Huffman v. Rhodes*, 72 Neb. 57.
4. ———: ———: **REVIEW.** Unless an abuse of discretion of the trial court in setting aside an interlocutory order is shown, an appellate court will not interfere therewith.
5. **Judicial Sale: MOTION TO VACATE: WAIVER.** A motion to set aside the confirmation of a judicial sale is not waived by later filing a motion to set aside interlocutory orders, and no prejudicial error results in considering both motions at the same time.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Will H. Thompson, for appellant.

James H. Van Dusen, contra.

EPPERSON, C.

This is an action for the partition of real estate. In 1901, the district court for Douglas county confirmed the shares of the parties and appointed referees to make partition. On the same day there was filed in the case a stipulation, signed by the attorneys of the respective parties, in which it was agreed that the decree should not be carried out except by written consent of counsel. On June 4, 1904, the referees reported to the court that they could not make a fair and equitable partition of the premises, and recommended sale. This report was afterwards confirmed, and the referees directed to sell the property as required by law. On the date of sale there was filed a stipulation, signed the previous day by the only counsel appearing of record, in which it was agreed that the order authorizing the sale of the property be vacated, and all proceedings thereunder be declared void, and that the proposed sale be discontinued. The stipulation recites that it is made by reason of the former stipulation and because of the fact that the parties had not agreed to proceed with the case. Ignoring this stipulation, the referees sold the land. Plaintiff was the purchaser at the sale. Two days subsequent to an order of the court confirming the sale, defendant filed a motion to set aside the order of confirmation, alleging as her reasons the existence of the above facts relative to the stipulations. At the next term of court defendant filed another motion, in which she asked that the order confirming the report of June 4, 1904, and an order of July 27, 1904, modifying the same, be vacated, and the sale set aside. From the judgment of the court sustaining defendant's motions plaintiff appeals.

1. It is not necessary to consider the legal effect of the first stipulation. Both parties complied with its terms for three years. Finally, referees took steps toward making a sale of the property. Then it was that the second stipulation was filed. There was no contention that it was

made through fraud. It was on file when the court confirmed the sale. The court's attention was not called to it. No attempt was made to have it annulled. If unjust, it might have been set aside upon proper showing, with notice. *Keens v. Robertson*, 46 Neb. 837. Plaintiff's present counsel should not have moved for confirmation with that stipulation on file, without calling it to the court's attention. In our opinion, the confirmation of the sale without consideration of the stipulation was an irregularity justifying the court in setting aside the order of confirmation under section 602 of the code.

2. Plaintiff argues that before defendant can obtain relief she must allege and prove that she was prejudiced by the irregular proceedings. Many cases are cited by appellant to the effect that the moving party must allege and prove that he has a valid cause of action or defense which would *prima facie* entitle him to relief. These cases pertain to judgments or orders which from their nature require evidence as to the merits of the cause of action or defense. Such cases need not be distinguished here. Indeed, we desire to adhere strictly to that rule. But the nature of the judgment or order assailed governs the sufficiency of the motion to annul and the proceedings thereunder. Where the judgment required evidence on the merits to sustain it, the motion or petition assailing it should allege, and the evidence in support thereof should prove, not only the irregularities complained of, but facts relative to the merits which show a *prima facie* cause of action or defense. There must be presented to the court such matters as could have been presented upon the trial or hearing wherein the judgment or order assailed was rendered. Where the order assailed was not based upon evidence, but was the natural sequence of the court's proceeding, such as the confirmation of a judicial sale, the motion assailing needs to set forth only such irregularities as would *prima facie* show a meritorious reason why the sale should not be confirmed. As to whether or not the defendant was prejudiced is to be determined from the evi-

dence, which, in the case at bar, is sufficient to sustain the court's finding that the defendant is entitled to the relief she seeks. In a similar case in this court, *Fisk v. Thorp*, 60 Neb. 716, it is said by HOLCOMB, C. J.: "It is not required in such instances that there shall be tendered an answer, but only that the court shall find from the evidence that a valid defense exists. This may be found from evidence offered in support of the motion filed asking the vacation of the judgment." It cannot be said that the court should, before granting the relief, determine that the defendant would fare better had the proceedings been regular.

3. Plaintiff contends that by the filing of the second motion defendant either waived the first, or that the court could not entertain the second while the first was pending. The first motion attacked the order of confirmation, and the second interlocutory orders. The latter was not a waiver of the former, and no prejudicial error resulted in a consideration of both motions at the same time.

4. Plaintiff alleges error in the court's ruling upon the second motion filed. That motion assailed the interlocutory orders of the court. In *Huffman v. Rhodes*, 72 Neb. 57, it was held that an interlocutory order may be vacated at a subsequent term by the same court, without compliance with the provisions of section 602 of the code. No special procedure therefor is required on the part of the trial court in dealing with such orders, and unless an abuse of discretion is shown the reviewing court will not interfere with the judgment of the trial court in such matters. The evidence in this case not only shows the existence of the stipulations hereinbefore referred to, but the evidence of the defendant discloses that the successful bid at the sale was grossly inadequate. And, in addition to this, a written appraisal of the property in controversy clearly indicates that there could have been actual partition of the land without prejudice to either party.

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We recommend that the judgment of the trial court be affirmed.

AMES and OLDHAM, C.C., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

PHILANDER G. LOSO, APPELLANT, v. LANCASTER COUNTY,
APPELLEE.

FILED NOVEMBER 10, 1906. No. 14,450.

1. **Counties: PERSONAL INJURY: IMPUTED NEGLIGENCE.** The doctrine of identification or imputed negligence does not apply to one injured while riding in a private vehicle, where no privity exists between the injured person and the owner or driver of the vehicle, and the injured person himself is not guilty of contributory negligence.
2. ———: ———: ———. One who is injured by reason of a defective bridge while riding in a private vehicle may recover from a county otherwise liable, notwithstanding the negligence of the driver, which may have contributed to produce the injury, the injured party being free from negligence and having no authority or control over the driver.
3. **Case Modified.** The first paragraph of the syllabus of *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627, modified.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Reversed.*

Field, Ricketts & Ricketts, for appellant.

J. L. Caldwell, F. M. Tyrrell and Charles E. Matson,
contra.

EPPERSON, C.

Plaintiff Loso and an assistant went by rail to the village of Agnew, in Lancaster county, and from there

walked a mile and a half to the farm of one Rhoman to repair a well. After the work was completed Rhoman's son volunteered to convey them back to the village. A horse was hitched to a single buggy, and the three men started north along the highway in the direction of Agnew. A ravine, over which the defendant, the county of Lancaster, maintained a bridge, crosses the highway at right angles. The bridge was 16 feet long, was not protected by guard rails, and one corner had settled about a foot, causing the structure to slope toward the southeast. When the buggy approached the bridge, plaintiff was sitting on the east side, his assistant on the west, and Rhoman in the middle, driving the horse. A mist was falling and it was getting dark. As they approached to cross the bridge, the horse slipped on the wet boards and fell. In his efforts to arise he fell from the bridge, carrying the buggy and the three men with him to the bottom of the ravine, 16 feet below. Plaintiff was injured, and, under the provisions of the statute, brought this action against the county, alleging that the county was negligent in not providing side-rails and in permitting the bridge to slope toward one corner. The county contended that the driver, Rhoman, was guilty of contributory negligence, and a verdict was returned for defendant. The court instructed the jury "that, if the driver was negligent in driving upon the bridge in the manner he did under the circumstances, his negligence would be imputed to the plaintiff, and in that event the plaintiff could not recover." The giving of this instruction presents the principal question in the case.

As a general rule, "there can be no such thing as imputable negligence, except in cases where that privity which exists in law between master and servant and principal and agent is found." 16 Am. & Eng. Ency. Law (1st ed.), 447. The doctrine of imputed negligence or identification as to vehicles was first stated in the English case of *Thoroughood v. Bryan*, 8 C. B. 115. It was there held that a passenger in a public vehicle, though having no control over the driver, must be held to be so identified with the

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vehicle as to be chargeable with any negligence on the part of its managers which contributed to an injury inflicted upon such passenger by the negligence of a stranger. This decision has been followed by a few of the courts of this country, notably Wisconsin. *Prideaux v. City of Mineral Point*, 43 Wis. 513. *Thorogood v. Bryan*, however, has been recently overruled by the courts of England, because the reasons upon which the decision rests are "inconclusive and unsatisfactory," and the "identification upon which the decision * * * is based has no foundation in fact." *Mills v. Armstrong*, 58 L. T. n. s. 423.

The supreme court of the United States has also declined to follow *Thorogood v. Bryan*. In *Little v. Hackett*, 116 U. S. 366, Mr. Justice Field, speaking for the court, said:

"The truth is, the decision in *Thorogood v. Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal cooperation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world."

Not only are the authorities to the effect that the doctrine of identification or imputed negligence has no application to public conveyances, but the overwhelming weight of authority is that the doctrine cannot be extended to private vehicles.

Sanborn, J., speaking for the court, in *Union P. R. Co. v. Lapsley*, 51 Fed. 174, uses this language: "But, where the owner and driver of a team and carriage invites another to ride in his carriage, no relation of principal and agent is created; no relation of master and servant is established; the owner and driver of the team is not controlled by and is not in any sense the agent of the invited guest; and to hold him responsible for the negligence of

the former, by whose permission alone he rides, is unauthorized by law and repugnant to reason. That he who suffers injury from another's negligence may recover compensation of the wrongdoer is a principle founded in natural justice, and sustained by every precedent. That where the negligence of the person injured has contributed to the injury he cannot so recover, because it is impracticable in the administration of justice to divide and apportion the compensation in proportion to the varying degrees of concurring negligence, is equally well settled. But that he whose wrongful act or omission has caused the injury and damage, and who upon every consideration of justice and reason ought to make compensation for it, shall be permitted to escape because a third person, over whom the injured person had no control, and whose only relation to him was that of a guest to his host, has been guilty of negligence that contributed to the injury, is neither just nor reasonable. According to the verdict of this jury, a loss of \$1,000 was entailed upon the decedent by the negligence of this defendant. The defendant's wrongful omission was the proximate cause of this damage. The decedent in no way caused or contributed, by any act or omission of hers, to this injury. She had no control over her brother, the driver, who may have contributed by his carelessness to the damage. Upon what principle, now, can it be justly said that the decedent must bear all this loss when she neither caused, was responsible for, nor could have prevented it, because this third person assisted to cause the injury, the proximate cause of which was the wrongful act of the defendant company? If there exists in the realm of jurisprudence any sound principle upon which so unrighteous a punishment of the innocent and the discharge of the guilty may be based, we have been unable to discover it."

In *Dean v. Pennsylvania R. Co.*, 129 Pa. St. 514, 6. L. R. A. 143, it is said: "Quotations might be given from many cases in the different states, illustrating the very firm and emphatic manner in which the doctrine of this

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celebrated case (*Thorogood v. Bryan*) has been denied. The authorities in England, and the great current of authorities of this country, are against it. Nor can I see why, upon any rule of public policy, a party injured by the concurrent and contributory negligence of two persons, one of them his common carrier, should be held, and the other released from liability. As to this, I speak only for myself. In my opinion there is no principle consonant with common sense, common honesty, or public policy, which should hold one not guilty of any negligence, either of omission or commission, for the negligence of another, imputed to him under such circumstances. * * * Dean was riding in the wagon merely by invitation of Fields, who happened to be going in the direction of Dean's home with a load of provisions. He was carried without compensation, merely as an act of kindness on the part of Fields, who had sole control of the team and of the wagon. The case is similar in this respect to *Carlisle v. Brisbane*, 113 Pa. St. 544, and the case of *Follman v. Mankato*, 35 Minn. 522. We are clearly of opinion that if Dean himself was guilty of no negligence, the negligence of Fields cannot be imputed to him." See also *Bunting v. Hogsett*, 139 Pa. St. 363.

In *Dyer v. Erie R. Co.*, 71 N. Y. 228, the plaintiff was injured while crossing the defendant's railroad track on a public thoroughfare. He was riding in a wagon by the permission and invitation of the owner of the horse and wagon. At that time a train standing south of certain buildings, which prevented its being seen, had started to back over the crossing without giving the driver of the wagon any warning of its approach. The horses, becoming frightened by the blowing off of steam from engines in the vicinity, became unmanageable, and the plaintiff was thrown, or jumped, from the wagon, and was injured by the train, which was backing. It was held that no relation of principal and agent arose between the driver of the wagon and the plaintiff, and although he traveled voluntarily, he was not responsible for the negligence of the

driver, where he himself was not chargeable with negligence, and there was no claim that the driver was not competent to control and manage the horses.

In *Robinson v. New York C. & H. R. R. Co.*, 66 N. Y. 11, 23 Am. Rep. 1, it is said by Church, C. J.: "It is, therefore, the case of a gratuitous ride by a female upon the invitation of the owner of a horse and carriage. The plaintiff had no control of the vehicle, nor of the driver in its management. It is not claimed but that Conlon was an able-bodied, competent person to manage the establishment, nor that he was intoxicated, or in any way unfit to have charge of it. Upon what principle is it that his negligence is imputable to the plaintiff? It is conceded that if by his negligence he had injured a third person, she would not be liable. She was not responsible for his acts, and had no right and no power to control them. True, she had consented to ride with him, but as he was in every respect competent and suitable, she was not negligent in doing so. Can she be held by consenting to ride with him to guarantee his perfect care and diligence? There was no necessity for riding with him. It was a voluntary act on the part of plaintiff, but it was not an unlawful or negligent act. She was injured by the negligence of a third person, and was free from negligence herself, and I am unable to perceive any reason for imputing Conlon's negligence to her. * * * I am unable to find any legal principle upon which to impute to the plaintiff the negligence of the driver. The whole argument on behalf of the appellants on this point is contained in the following paragraph from the brief of its counsel: 'So if the plaintiff had proceeded on this journey upon the invitation of Conlon for the like purpose, she having voluntarily intrusted her safety to his care and prudence, and thus exposed herself to the risk of injury arising from his negligence or want of skill, she should be precluded from recovering if he thereby contributed to her injury.' If this argument is sound why should it not apply in all cases to public conveyances as well as private? The

acceptance of an invitation to ride creates no more responsibility for the acts of the driver than the riding in a stage-coach, or even in a train of cars, providing there was no negligence on account of the character or condition of the driver, or the safety of the vehicle, or otherwise. It is no excuse for the negligence of the defendant that another person's negligence contributed to the injury, for whose acts the plaintiff was not responsible. The rule of contributory negligence is very strict in this state, and should not be extended, nor should the rule of imputable negligence be extended to new cases where the reason for its adoption is not apparent."

In 7 Am. & Eng. Ency. Law (2d ed.), 447, the rule is stated thus: "Occupants of private conveyances. In the second class of cases there has been, and still is, much conflict among the authorities, but the true principle seems to be that when a person is injured by the negligence of the defendant and the contributory negligence of one with whom the injured person is riding as a guest or companion, such negligence is not imputable to the injured person; while, on the other hand, it may be imputable when the injured person is in a position to exercise authority or control over the driver."

In 1 Thompson, Commentaries, Law of Negligence, sec. 502, it is said: "While there are a few untenable decisions to the contrary, nearly all American courts are agreed that the rule under consideration extends so far as to hold that where a person, while riding on a private vehicle by the invitation of the driver, or the owner, or the custodian of the vehicle, and having no authority or control over the driver, and being under no duty to control his conduct, and having no reason to suspect any want of care, skill, or sobriety on his part, is injured by the concurring negligence of the driver and a third person or corporation, the negligence of the driver is not imputed to him so as to prevent him from recovering damages from the other tortfeasor." See also: *Covington T. Co. v. Kelly*, 36 Ohio St. 86; *Masterson v. New York O. & H. R. R. Co.*,

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84 N. Y. 247; *Strauss v. Newburgh E. R. Co.*, 39 N. Y. Supp. 998; *Kessler v. Brooklyn H. R. Co.*, 38 N. Y. Supp. 799; *Metropolitan Street R. Co. v. Powell*, 89 Ga. 601; *City of Leavenworth v. Hatch*, 57 Kan. 57; *Cahill v. Cincinnati, N. O. & T. P. R. Co.*, 92 Ky. 345; *Noyes v. Boscawen*, 64 N. H. 361; *Ouverson v. City of Grafton*, 5 N. Dak. 281; *St. Clair Street R. Co. v. Eadie*, 43 Ohio St. 91; *Carlisle v. Brisbane*, 113 Pa. St. 544; *Philadelphia, W. & B. R. Co. v. Hogeland*, 66 Md. 149; *Baltimore & O. R. Co. v. State*, 79 Md. 335; *Alabama & V. R. Co. v. Davis*, 69 Miss. 444; *Follman v. Mankato*, 35 Minn. 522; *Board of Commissioners v. Mutchler*, 137 Ind. 140; *Becke v. Missouri P. R. Co.*, 102 Mo. 544; *Sluder v. St. Louis Transit Co.*, 189 Mo. 107; *Larkin v. Burlington, C. R. & N. R. Co.*, 85 Ia. 492; *Randolph v. O'Riorden*, 155 Mass. 331; *Tompkins v. Clay Street R. Co.*, 66 Cal. 163; *Duval v. Atlantic C. L. R. Co.*, 134 N. Car. 331, 65 L. R. A. 722; *Louisville & N. R. Co. v. Molloy's Adm'x*, 91 S. W. (Ky.) 685.

The overwhelming weight of authority in this country is that the negligence of the driver of either a public or private vehicle is not imputable to the passenger or guest. Especially should this rule apply to a case like the one in hand, where it was not shown that the relation of master and servant, or principal and agent, or the like, existed, and where it was not shown that the plaintiff had any control, or right of control, of the driver.

In 1 Shearman & Redfield, Law of Negligence, sec. 66, the authors, after giving the history of the doctrine announced in *Thorogood v. Bryan*, say: "The only remnant of this doctrine which remains in sight anywhere is the theory that one who rides in a *private* conveyance thereby makes the driver his agent, and is thus responsible for the driver's negligence, even though he has absolutely no power or right to control the driver. This extraordinary theory, which did not even occur to the hair-splitting judges in *Thorogood v. Bryan*, was invented in Wisconsin, and sustained by a process of elaborate reasoning. * * * The notion that one is the

'agent' of another, who has not the smallest right to control or even advise him, is difficult to support by any sensible argument. This theory is universally rejected, except in the three states mentioned (Wisconsin, Nebraska, and Montana) and it must soon be abandoned even there."

We have not overlooked the case of *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627, referred to in 1 Shearman & Redfield, Law of Negligence, sec. 66, *supra*. In that case this court imputed to the plaintiff the carelessness of the driver of a private conveyance on the ground that the driver must be considered the agent of the plaintiff. It was held in the first paragraph of the syllabus: "(1) That the conveyance being a private one the driver was the agent of the injured person. (2) If the act of the driver in going upon the crossing without looking and listening was negligence which contributed to the injury received, the injured person cannot recover." A consideration of the doctrine of imputed negligence was not necessary to the disposition of the case. *Prideaux v. City of Mineral Point*, 43 Wis. 513, was followed without a discussion of the numerous authorities in conflict therewith. This question was not discussed in the opinion, but the learned commissioner assumed that the doctrine of imputed negligence applied to that case.

A correct conclusion was reached in the *Talbot* case, and it has been reaffirmed by this court in numerous subsequent cases, among which are: *Brady v. Chicago, St. P. M. & O. R. Co.*, 59 Neb. 233; *Hajsek v. Chicago, B. & Q. R. Co.*, 68 Neb. 539, 5 Neb. (Unof.) 67. However, the question of imputed negligence or identification was not necessarily involved, because in that case plaintiff was guilty of contributory negligence in attempting to cross a railroad track without taking the precaution to stop, look and listen. It was therefore immaterial in that case whether or not the negligence of the driver was imputable to the plaintiff. His own contributory negligence was a bar to a recovery against the railroad company.

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See cases last above cited, and also *Colorado & S. R. Co. v. Thomas*, 33 Colo. 517. Mr. Commissioner AMES held in *Hajsek v. Chicago, B. & Q. R. Co.*, 68 Neb. 539: "Except with respect to the relation of partnership, or of principal and agent, or of master and servant, or the like, the doctrine of imputed negligence is not in vogue in this state." Although this decision was vacated on rehearing and the judgment affirmed on the ground that the plaintiff was guilty of contributory negligence (5 Neb. (Unof.) 67), no doubt remains that what was said in that case concerning the doctrine of imputed negligence is the law in this state, and is sustained by the great weight of authority in this country. See, also, *Huff v. Ames*, 16 Neb. 139. We are therefore of opinion that the *Talbot* case should be modified in so far as it makes the driver of any private vehicle the agent of his guest, and applies the doctrine of identification or imputed negligence to all persons injured while riding in a private conveyance, no matter what the circumstances or relationship of the parties may be.

The defendant in the case at bar cites cases which, it is contended, support the theory of imputable negligence. In *Bartram v. Sharon*, 46 L. R. A. 144, 71 Conn. 686, it was held: "No recovery can be had under a statute giving a right of action for a penalty in case of injuries caused by a defective highway, where the injury is caused by such defect combined with the negligence of a third person." To the same effect is *Orr v. City of Oldtown*, 99 Me. 190, 58 Atl. 914. These cases were not based upon the doctrine of imputed negligence, but each was founded upon a statute which the court construed as giving a cause of action only in the event that the injury arose wholly from the defective highway. It is not contended that our statute is of such narrow scope. In *Mullen v. City of Owosso*, 100 Mich. 103, the contention of defendant herein is upheld, but by a divided court. Hooker, J., with whom concurred the chief justice, wrote an able dissenting opinion, concluding in these words:

"The time has arrived when the question must be settled. I think it should be in conformity to the weight of authority, and the better rule." *Evensen v. Lexington & B. Street R. Co.*, 187 Mass. 77, 72 N. E. 355, was disposed of very much as *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627, and is subject to the same objection. The court apparently assumed, without discussion, that the doctrine of imputed negligence applied. Defendant cites other cases that may be distinguished from the case before us. These we will not review at length. Many of them were cases brought to recover for injuries received at railroad crossings by collision with locomotives, and where the injured party himself was negligent, or could by the exercise of ordinary care and prudence have checked or remonstrated with the driver as they were approaching a known place of danger.

We are convinced that imputable negligence exists only where there is privity between the injured person and the one whose contributory negligence cooperated with the negligence of the defendant in causing the injury. In the case before us, plaintiff was practically unacquainted with the defective bridge. He had no reason to believe it dangerous. He accepted an invitation from Mr. Rhoman, the owner of the vehicle in which the plaintiff was riding when the injury was inflicted. Rhoman was not under the control of the plaintiff. He was not plaintiff's agent or servant. No privity existed between them. Plaintiff was acquainted with no facts which would prompt a prudent man to interfere with the course taken by the driver. The first danger he knew was the slipping of the horse when it fell upon the bridge. This was followed immediately by the precipitation of the plaintiff to the bottom of the ravine. At no time could plaintiff advise or remonstrate with his driver. We find no sound rule of law by which the negligence of Rhoman, if any, may be imputed to the plaintiff under the circumstances disclosed in this case. In our opinion, the instruction complained of imputing the negligence of the driver, if

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any, to the plaintiff was wrong and should not have been given.

In his petition plaintiff alleged that the injury was caused "without any fault or negligence on the part of the plaintiff or the person driving said vehicle." Defendant now contends that by reason of this allegation plaintiff was required to prove that Rhoman, the driver, was without negligence. In construing a petition most strongly against a party pleading, courts should not resort to a technical construction of the words used. The allegation referred to was unnecessary. It did not add to plaintiff's cause of action. It was pleading a conclusion, and should be construed as though it read: "Said injury was without fault or negligence of the person driving, which could be imputed to the plaintiff."

We recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

ST. PAUL HARVESTER COMPANY, APPELLEE, V. LOUIS
FAULHABER, SR., ET AL., APPELLANTS.

FILED NOVEMBER 10, 1906. No. 14,488.

New Trial. Newly discovered evidence, merely cumulative in character, may be a sufficient ground for granting a new trial, if the circumstances of the record are such as to render it highly probable that it would, if produced, have changed the result of the trial. *German Nat. Bank v. Edwards*, 63 Neb. 604.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Reversed*.

Talbot & Allen, for appellants.

B. F. Johnson and Clark & Allen; *contra*.

EPPERSON, C.

In 1890, the plaintiff, St. Paul Harvester Company, recovered judgment against appellants in the district court for Lancaster county. This judgment became dormant, and in 1904 plaintiff instituted these proceedings to revive it. Defendant, Louis Faulhaber, Sr., objected to revivor because no summons had been served on him in the original action and the court never acquired jurisdiction over his person. Trial was had to the court, an order reviving the judgment was entered, and defendant, Faulhaber, Sr., appeals.

The principal questions argued are that the evidence does not sustain the judgment of revivor, and the court erred in not granting a new trial on the ground of newly discovered evidence. The officer's return showed that appellant was served by delivering to him personally a true and certified copy of the writ. The deputy sheriff, who made the return, testified that he did not remember anything about the circumstances of this particular summons, but that it was duly served that way or he would not have made the return. He stated that he did not know appellant personally. "Q. Would it have been possible for you to have served someone else instead of old man Faulhaber? A. If anybody had been at his house when I was there, and represented to be him when I asked him his name, and claimed that he was Faulhaber, Sr., I might have done that, not knowing him personally; but I don't think that would be possible. Q. You wouldn't swear positively now that you served Louis Faulhaber, Sr., as you have no recollection of that fact? A. I would only rely at this time on my return on the summons at that time." Appellant testified positively that no summons was ever served on him in this case; that

he was never sued in his life; that soon after the judgment was obtained he learned of it through a letter received from plaintiff's attorney, Mr. Stewart, and thereupon consulted his attorney, Mr. Stearns. John M. Stewart, who was at one time attorney for plaintiff, and who obtained the purported judgment herein sought to be revived, testified that soon after the judgment was obtained he, in company with appellant and his attorney Stearns, interviewed the deputy sheriff as to the service, after which witness told Stearns that he would not put appellant to the trouble and expense of an injunction suit to restrain the collection of the judgment, and that thereafter plaintiff made no attempt to collect the judgment from appellant. R. D. Stearns, who was attorney for appellant in 1890, corroborated the testimony of Mr. Stewart. Other testimony was introduced tending to show that appellant was financially responsible at the time the original judgment was entered, and that collection could have been made at any time from that date until the present suit was begun, but no effort was made along that line. We have read the evidence carefully and are convinced that there is serious doubt as to the correctness of the conclusion of the learned trial court. In this state of the record, defendant asked a new trial on the ground of newly discovered evidence. It was shown that the witness Stearns had discovered a written memorandum, which, omitting title, is as follows: "Action. Injunction Suit. Date, 1890, Sep—. Looked after the above matter and got judgment vacated as to Faulhaber, Sr." Stearns says in his affidavit: "Affiant, at the time of giving his testimony in the case, had forgotten that any record of the transaction had been made. Affiant further says that, owing to the agreement made between L. Faulhaber, Sr., and the attorney for the St. Paul Harvester Co., by which L. Faulhaber, Sr., was to be released from the judgment, said injunction suit was not filed." Other newly discovered evidence was to the effect that Mr. Stewart, plaintiff's attorney, had admitted that there was

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no judgment against Faulhaber, Sr. A proper showing of diligence was made, and it seems clear to us that a new trial should have been granted. It is argued that the new evidence was merely cumulative. Be that as it may, in such a close case as this is, we think the offered evidence might have changed the result. *German Nat. Bank v. Edwards*, 63 Neb. 604. The testimony given by the witnesses as to conversations and transactions had 14 years previous was necessarily lacking in positiveness, and the newly discovered evidence would be of value in fixing certainty to the facts testified to by them.

We recommend that the judgment be reversed and the cause remanded for a new trial.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

ISAIAH GOOD BEAM, APPELLEE, V. JAMES C. BEAM ET AL.,
APPELLANTS.

FILED NOVEMBER 10, 1906. No. 14,463.

Evidence examined, and held to support the finding of the district court.

APPEAL from the district court for Nuckolls county:
LESLIE G. HURD, JUDGE. *Affirmed.*

Mockett & Mattley, R. D. Sutherland, George W. Groves
and *C. F. Strop*, for appellants.

S. W. Christy, contra.

DUFFIE, C.

December 26, 1902, Michael Beam, the father of the plaintiff and of the defendants James C. Beam and Phoebe

Glock, made a contract with the plaintiff, by the terms of which plaintiff was to pay to Mrs. Carrie Mathis \$1,200 with interest, to Philip Glock \$350, to Robert Tweed \$60, and to Mrs. Glock \$1,000. In addition he was to furnish the said Michael Beam with a comfortable home, board, nursing, care, washing, mending, medicines, physician's care, when needed, and \$100 per annum; in consideration of which the said Michael Beam agreed that plaintiff should have the full control, use and income from the north half of section 24, township 4, range 5, in Nuckolls county, for and during the term of the natural life of said Michael, and at his death the premises were to become the absolute property in fee simple of the plaintiff. Thereafter Michael Beam lived upon the farm with his son until July 21, 1903, when he demanded a surrender of the contract, which being refused, he left the house, and from that date until April 8, 1904, made his home with his daughter Phoebe Glock, spending, however, some time in Kansas with his son James C., and also visiting the territory of Oklahoma. On August 11, 1903, the plaintiff wrote his father, who was then in Kansas, stating that he and his wife had made up their minds to leave the farm and that his father could have it to do with as he pleased; that he would leave March 1, 1904. He concluded the letter by saying: "This is the last writing I ever expect to do to you, and I don't want you to answer this or to come near me or in my house so long as I live, for I have not misused you, and Emma says the same, to stay away. P. S. I will give you the contract March 1, 1904. Burn that will at once and forever shut up about thing. Hoping you will find some fool that you can run over and knock down, then kick him for falling." Thereafter the plaintiff visited his father in Kansas, and tried to induce him to return to his home. One or more letters asking his father to return were written by the plaintiff, but all without effect. On April 8, 1904, the old gentleman returned to the farm where, after a few days, he was taken sick and died on the 19th of April,

1904. After his death the plaintiff brought this action against the defendants, his brother and sister, to enforce specific performance of the contract made with his father, alleging full performance upon his part. It is not controverted that, after the making of the contract, the plaintiff paid Michael Beam \$100, Carrie Mathis her claim of \$1,200, and interest, Robert Tweed \$60, and interest, Philip Glock about \$200, and he tendered into court \$100 for Philip Glock, and \$1,000 for Phoebe Glock; that he paid something over \$100 on account of doctor's bills and funeral expenses of his father. The answer of the defendants alleges that plaintiff had failed to comply with the terms of the contract made with his father, and had violated and repudiated that contract; that the contract was obtained by undue influence, and also alleges the mental incapacity of Michael Beam to make the contract. The evidence is contained in a voluminous bill of exceptions, and we will confine our consideration of the testimony to what we regard as most material in determining the rights of the parties.

The land in controversy is worth from \$16,000 to \$18,000. Prior to the making of the contract Michael Beam had advanced to his oldest son, James C., money and property to the amount of about \$7,000. The daughter had been thoroughly educated in the usual branches, as well also as in music. These matters the father had discussed with a number of the witnesses, and one of them testified: "He told me what he had done for Mrs. Glock and Jim; that Jim had all that was coming to him, and that Mrs Glock had chosen between an education and interest in the estate, and she had taken the education, and Good had done the work at home all the time and should have the farm." Prior to the making of this contract the old gentleman had caused a conditional deed of the farm to be made to his son Good, and called on a notary to acknowledge it. The notary read it over, and advised that before he execute it he consult with one of his old friends, a Mr. Tweed. Tweed advised against the making of the

deed, and told him to keep his property in his own hands, and the deed was destroyed. This deed, like the contract in suit, provided for the payment to the old gentleman of a certain annual sum, \$1,000 to his daughter, the debts mentioned above, and a certain amount to his son James C. Afterwards the contract in question was drawn up by some party at the solicitation of the plaintiff, who left it on the forenoon of the day of its date in the hands of a notary, and on the afternoon of that day Michael Beam called and executed it. Before execution, the notary, at his request, read it to him twice, and that part of it providing for his own "keep," as he termed it, was read three times, after which it was duly signed and acknowledged. We infer from a careful reading of the evidence that sometime after its execution the old gentleman was led to believe, from conversations with third parties, that the contract operated as an absolute conveyance of the land, or, as it is termed by one of the witnesses, "a bond for a deed," and divested him of all interest in it. It was then, apparently, that he became dissatisfied and demanded a return of the contract. This being refused, he left the farm, as before stated, and remained away from July until the following April. We cannot avoid the impression that, if the old gentleman's suspicions had not been aroused as to the character of the contract, if he had not been led to believe that it took from him all interest in the land, this controversy never would have arisen. Nevertheless, when he demanded a rescission of the contract and a surrender of the agreement, and the plaintiff, in his letter of August 11, agreed to surrender it, this may have operated as a rescission, unless it is further made to appear that the old gentleman returned to the farm of his own volition and with a full understanding of what he was doing. On his return, one of his grandchildren asked him when he was going away, and he replied that he had come to stay, that it was his home, that he never would have left it except for the interference of other parties. To one of the neighbors, with whom he rode from church on the Sunday preceding

his return, he said that he was going back, that there was no place like home. The doctor who attended him in his last illness, and others who saw him during the time, testified to his full mental capacity up to within two or three days of his death. There is some evidence in the record tending to show mental incapacity on his part about the time the contract was made, and thereafter, but its character is such as not to impress us as entitled to any great weight, and, when compared with that of his physician and those who were most intimately acquainted with him, is completely overcome. One other circumstance, while not affecting the legal rights of the parties, should be mentioned. While in Kansas, and before returning to the farm, the old gentleman had a will prepared, by the terms of which he gave his daughter Phoebe \$2,000, and his son James \$1,000. A life estate in the farm was vested in his son Good, with remainder over to Good's children. He had also prepared a deed, in which his property was disposed of in the same way. These several instruments, and his frequent talks with his friends and neighbors, impress us with the belief that the old gentleman had always thought that his eldest son had received his share of the estate, and that an additional amount of \$1,000 or \$2,000 was the full share of the daughter in addition to what she had already received in the way of education and other advancements, and that, even while the misunderstanding between himself and his son Good existed, he intended to hold the farm for Good and his children. The evidence is quite conclusive as to the good care and consideration which the father received while living with the plaintiff, and were it not for the letter which the plaintiff himself wrote to his father, and another one found in the record written to his brother James, we would be disposed to say that the relations between the parties were as pleasant as usually exist between father and son living in the same house and conducting the same farm. While there was some excuse for writing the letters referred to, in the heat of the moment, and while the son was laboring under the impression that

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the large sums of money paid on behalf of his father were lost, we find in those letters the only strong evidence against the enforcement of this contract, but, on the whole, are satisfied that the district court took the correct view of the case in entering a decree ordering a specific performance.

We recommend an affirmance of the decree.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

WILLIAM REESE, APPELLANT, v. WATAEWE HARLAN,
APPELLEE.

SOLOMON WOODHULL, APPELLANT, v. AGGIE WOODHULL,
APPELLEE.

JOSEPHINE HARLAN, APPELLANT, v. ALICE FREMONT,
APPELLEE.

FILED NOVEMBER 10, 1906. Nos. 14,490, 14,491, 14,492.

Indians: ALLOTTEE OF LANDS: ESTATE OF WIDOW. The widow of an allottee of Omaha Indian lands is entitled to a life estate in the equitable fee of her deceased husband, with remainder over to the issue of the marriage, or to the surviving father or mother of the husband if no issue survive her.

APPEALS from the district court for Thurston county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

H. Chase, for appellants.

Thomas L. Sloan, *contra*.

DUFFIE, C.

These three cases involve the right of the widow of an allottee under the act of congress, approved August 7, 1882,

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to a life estate in the unexpired equitable title of the allottee to Indian lands after the death of her husband as against the father or the mother of the deceased. The appellant claims that the unexpired term of 25 years during which the United States holds the legal title in trust is a chattel real which, under the terms of the sixth section of the act, descends to the next of kin, and that our statute giving the widow a life estate in the absence of issue is not applicable. The sixth section, so far as it affects the case, is as follows: "That upon the approval * * * by the secretary of the interior, he shall cause patents to issue * * * of the legal effect and declare that the United States does and will hold the land thus allotted for the period of 25 years in trust for the sole use and benefit of the (allottee) * * * or in case of his decease, of his heirs according to the laws of the state of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in said state shall apply thereto after patents therefor have been executed and delivered." 22 U. S. St. at Large, p. 342, ch. 434.

In *Porter v. Parker*, 68 Neb. 338, and *McCauley v. Tyndall*, 68 Neb. 685, the question was examined and determined against the contention of the appellant, and, following these cases, we recommend an affirmance of the decree of the district court.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

MYERS ROYAL SPICE COMPANY, APPELLANT, v. WALLACE B.
GRISWOLD, APPELLEE.

FILED NOVEMBER 10, 1906. No. 14,456.

Sale: BREACH OF CONTRACT: DAMAGES. Plaintiff, through its traveling salesman, took defendant's order for a quantity of "stock food." At the time the order was taken such salesman was assisting the defendant in selling and creating a market for stock food of the same kind previously sold to the defendant by plaintiff, and the order was given on condition that such salesman would continue thus to assist the defendant for a certain time. The salesman left immediately after taking the order, and gave the defendant no further assistance. *Held*, That the measure of defendant's damage is the reasonable value of the services which were to be rendered to him by the salesman according to the terms of the contract of sale.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Reversed*.

Wilson & Brown, for appellant.

H. J. Whitmore, contra.

ALBERT, C.

This litigation commenced in justice court, and reached the district court on appeal. The petition alleges the sale and delivery of certain stock food by the plaintiff to the defendant, and that there is due therefor from the defendant to the plaintiff the sum of \$120, with interest from October 6, 1903, the date of sale. The answer contains a general denial, which is followed by these allegations: "Further answering defendant alleges that the goods for which plaintiff now asks judgment in this action were shipped by plaintiff to defendant upon the express condition and understanding that the plaintiff should have an experienced salesman come to and remain in defendant's territory for at least one week, actively at work soliciting orders from the trade for plaintiff's goods, and introduc-

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ing same to the public, and thereby enable this defendant to build up a market for the goods theretofore received by him from plaintiff as well as the goods described in plaintiff's petition; that plaintiff wholly failed to keep and comply with the said agreement, and did not send a salesman to remain and work in said territory for at least one week, and that by reason thereof this defendant, when said goods arrived at Lincoln, refused to accept them, but placed them in his warehouse, and immediately notified plaintiff that he would not accept them and that they were in the warehouse subject to plaintiff's disposal, and that defendant has since repeatedly notified plaintiff of his rescission of said purchase, but that plaintiff has failed and neglected to remove said goods from defendant's warehouse where they still remain subject to plaintiff's order." As a further defense, in the nature of a counterclaim, the answer alleges that in May, 1903, and previous to the sale and delivery of the goods in question, the plaintiff had sold a quantity of goods of the same character, and that it was a part of the contract of the sale thereof that the plaintiff would "at once put one or more experienced men at work in defendant's territory who would travel with defendant's men, and introduce said goods and place orders for same with defendant, and said Caldwell assured defendant that the greater part, if not all of said trial orders, would be disposed of by plaintiff's own men, and without any expense to defendant, and that defendant's own salesmen would be instructed in the best method of handling said stock food, and be enabled to conduct a successful trade thereof in the future." It is further alleged that the plaintiff failed to keep and perform its said contract with respect to putting one or two men in defendant's territory for the purposes hereinbefore stated, and did not put a man in said territory until about September 1, 1903, "who visited but few places, and secured but a very few orders," and that by reason of plaintiff's failure to keep and perform that part of its said contract the defendant has been damaged in the sum of \$170. The de-

fendant includes in his counterclaim a charge for freight and storage on goods covered by the second sale, that being the sale upon which plaintiff bases its right to recover. The reply is a general denial.

The evidence shows that the first contract of sale, as well as that upon which plaintiff seeks to recover, was made by the defendant with a traveling salesman acting for the plaintiff, and fully sustains the allegations of the answer with respect to the conditions upon which the sales were respectively made. It further shows that at the time the second sale was made plaintiff's traveling salesman who acted for the plaintiff in making the sale was in the defendant's territory in pursuance of the first contract of sale assisting the defendant to establish a market for the goods; that he represented to the defendant that the goods on hand could not be sold on account of the size of the packages, unless there were larger-packages to go with them, and that at his solicitation defendant gave an order for a ton of the goods in packages of a larger size, on condition that the salesman would continue a week longer in his efforts to dispose of the goods already on hand. The order was made out in writing and forwarded to the house, the salesman adding thereto this provision: "Provided my services are continued for a time." It appears from the evidence that the salesman left the territory immediately after taking the order and made no further effort to dispose of the goods on hand or establish a market for them. The defendant offered evidence tending, it is claimed, to show a rescission of the contract of sale on which the suit was brought, which was excluded. The reason of this ruling is not clear, but it was apparently on the theory that, the goods having been delivered, the defendant could not rescind, but was left to his remedy for damages for breach of contract, and the cause was submitted on that theory. Ordinarily under such circumstances the defendant would be entitled to rescind.

Among the instructions given by the court are the following: "(5) If you find and believe that the plaintiff

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so failed in its contract, and that the defendant has been damaged, then and in that event you are instructed that the measure of the defendant's damage would be the difference between the contract price for such merchandise and the actual value thereof in the city of Lincoln, in the defendant's possession, after the failure of the said plaintiff to comply with its said contract. (6) That is, in event you find and believe that the said plaintiff failed to comply with its contract and furnish an agent for a reasonable length of time, and that on account thereof the merchandise became valueless to the defendant, and there was no market therefor, and on account of plaintiff's failure the defendant could not sell the same, then and in that event the defendant's set-off for damages would be equal to the amount of the plaintiff's claim herein and there would be no recovery on the part of the plaintiff. On the other hand, if you find and believe that such goods still had a value, notwithstanding the plaintiff's failure to comply with its contract, but that the defendant was only embarrassed in the sale thereof, and hindered and delayed in the disposition of the same, then and in that event, from all the evidence now before you, it is for you to say what actual damages the defendant sustained by reason of such failure on the plaintiff's part." The jury found in favor of the defendant in the sum of \$185 and, after deducting therefrom \$131.90, the amount found due the plaintiff on its cause of action, returned a verdict in favor of the defendant for the remainder. From a judgment rendered on the verdict the plaintiff appeals.

The appeal is prosecuted in pursuance of the provisions of an act of 1905, providing for appeals to this court in all civil cases, and repealing the provisions of the code providing a remedy by proceedings in error in such cases. Code, sec. 675. The defendant contends that the appeal should be dismissed because the act in question is unconstitutional. Even were we to resolve that question in favor of the defendant, it would avail him nothing, because we should still be required to review the case. The

plaintiff filed a transcript within the time required by the amendatory act, as well as within the time required by the former provisions of the code with respect to proceedings in error. The transcript is accompanied by an assignment of errors, wherein the errors are assigned with all the particularity required in a petition in error. The defendant has entered a general appearance. The jurisdiction of this court is therefore complete and its duty to review the cause imperative, whether the new act providing a remedy by appeal or the former provisions of the code with respect to proceedings in error be held to be in force. Consequently, the constitutionality of the act in question is not necessarily involved, and we must forego its discussion.

The plaintiff complains of the instructions hereinbefore set out because they do not state the correct rule for the measure of damages and have no foundation in the evidence. This complaint we think is well founded. There is no evidence from which the jury could find that the goods had depreciated in value in any specific amount because of the plaintiff's failure to comply with its part of the contract with respect to furnishing a salesman to assist in disposing of them. Indeed, it is hardly conceivable that such evidence is attainable, because, of necessity, it must be based on mere conjecture and speculation as to the profits the defendant would have realized in consequence of the efforts of the salesman furnished by the plaintiff had one been furnished. The plaintiff's default consists of its failure to furnish a salesman according to the terms of its agreement. The defendant's loss on account of such failure is the loss of the services of such salesman, and his damage is the reasonable value of the services of a salesman to perform the services which the plaintiff agreed as part of its contract of sale its salesman would perform for the defendant at the time and place specified. The plaintiff also complains of the ruling of the court on its motion to strike certain portions of the answer on the ground that they contain matters in

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defense which were not pleaded in justice court. No complaint is made on this ruling in the motion for a new trial, therefore it is unnecessary to consider it at this time.

For the errors in the instruction as to the measure of damages, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

JOHNS & SANDY ET AL., APPELLANTS, v. IRA REED, SHERIFF,
APPELLEE.

FILED NOVEMBER 10, 1906. No. 14,465.

1. **Sales: REPLEVIN.** The creditors of a vendor who has made an illegal sale of his property cannot seize the same unless they can show that such transfer was an invasion of, and prejudicial to, their rights.
2. ———: **VALIDITY.** Ordinarily, a sale made with the knowledge and intention of both parties that the subject matter thereof shall be used for an illegal purpose, is illegal; but where such use is not in contemplation of the parties at the making of the sale, a subsequent use of the subject matter for an unlawful purpose does not render the sale illegal.
3. **Conditional Sales: VALIDITY.** A condition in a contract of sale, whereby the title is to remain in the vendor until the full amount of the contract price is paid, is void as against purchasers and judgment creditors of the vendee in actual possession, unless reduced to writing, signed by the vendee, and a copy thereof filed with the county clerk or register of deeds of the proper county.
Comp. St., ch. 32, sec. 26.

APPEAL from the district court for Box Butte county:
JAMES J. HARRINGTON, JUDGE. *Reversed as to defendant Reed.*

William Mitchell and R. C. Noleman, for appellants.

W. G. Simonson, B. F. Gilman and Wilson & Brown, contra.

ALBERT, C.

This is an appeal from a judgment rendered in an action of replevin brought against the sheriff to recover possession of certain property which he had taken under certain orders of attachment issued against one Tyler, who is not a party to this suit. On and prior to the 16th day of June, 1903, Tyler was a licensed saloon-keeper in the city of Alliance, and the owner of the saloon fixtures and stock of liquors, etc., in controversy in this action. At about that date he entered into negotiations with Johns & Sandy, the plaintiffs, looking to a sale of his stock and fixtures to them. Previous to that time the plaintiffs had been engaged in the saloon business in the state of Colorado, where, according to certain evidence, which was received without objection, a saloon license is transferable by assignment. The parties finally reached an agreement and a sale of the property from Tyler to the plaintiffs was consummated in the city of Denver. The nominal consideration paid by the plaintiffs was \$1,864, and of this amount \$3,864 was paid in cash. The remainder was evidenced by a promissory note which was deposited with a certain bank with the understanding that it was to be paid in case the plaintiffs were permitted to continue the saloon business under the license previously issued to Tyler, otherwise to be returned to the plaintiffs. The intervener Coors at the time of the transaction was the proprietor of a brewery in the city of Denver, and furnished the plaintiffs the money necessary to pay the cash consideration, upon their agreement to buy the beer required in their business from him, and took a mortgage on the stock and fixtures as security for the money advanced. The plaintiffs at once took possession of the property and, for some days at least, continued the saloon business

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without taking out a license in their own names. About the first day of July, 1903, they were notified that they would not be permitted to conduct the business without taking out a license. There is evidence tending to show that as soon as it was brought to the notice of the intervener, Coors, that the plaintiffs could not carry on the business without taking out a license in their own names he ordered them to close the saloon and do no further business until they had procured such license. The evidence also shows that, in order to enable them to take out a license, Coors advanced the plaintiffs the further sum of \$1,500, taking a second mortgage on the property in question. Both his mortgages were duly filed for record on the first day of July, 1903. Sometime before the sale by Tyler to the plaintiffs, he had negotiated with the National Cash Register Company, another intervener, for the purchase of a cash register. He finally telegraphed this intervener to send him the register, and they forwarded it by express. It is part of the property which was transferred to the plaintiffs by Tyler, and is one of the articles taken under the writ of replevin in this case. This intervener alleges that the sale was made to Tyler on condition that he should sign a conditional contract whereby the title should not pass until the price of the register had been paid, but that Tyler fraudulently, and without consent of this intervener, obtained possession of the register from the express company, and that no sale thereof was in fact made to him. The orders of attachment under which the defendant sheriff claims the right of possession issued in suits brought on debts which existed against Tyler at the time of his sale to plaintiffs, and were levied on the 20th day of July, 1903. At the conclusion of the evidence the court instructed the jury to return a verdict in favor of the defendant sheriff for the aggregate amount of the writs under which he had attached the property, but in favor of the plaintiffs and against the intervener, the National Cash Register Company. The plaintiffs and both interveners appeal.

We gather from the briefs filed in this court that the trial court proceeded on the theory that the sale made by Tyler to the plaintiffs was illegal and void as to the existing creditors of the former, because made with the understanding that the plaintiffs should use the subject matter of the sale for an illegal purpose, namely, the sale of intoxicating liquors in this state without a license in their own names, but under a license theretofore issued to their vendor. Assuming that the sale was made to the plaintiffs for that purpose, still we think the sheriff, as the representative of the attaching creditors, is in no position to assail it. In *Hall v. Hart*, 52 Neb. 4, it was held that "an insolvent debtor, or one in failing circumstances who parts with money or property under a contract in violation of statute, or which is void as against public policy, will be held to stand in the same position as one making a voluntary conveyance in fraud of creditors." The foregoing rule is more favorable to creditors than was required by the facts in that case, and it may be doubtful whether it can be sustained on authority. But a reexamination of the question is not required at this time, because the facts in the present case do not bring it within that rule, but rather within that announced in *Brower v. Fass*, 60 Neb. 590. In that case the court, dealing with a state of facts somewhat similar to those involved in the *Hall* case, *supra*, as well as those in the case at bar, said:

"But the illegality of the sale was not alone sufficient to justify the sheriff in levying upon the property as the property of Huette. It was held in *Hall v. Hart*, 52 Neb. 4, that, where property of an insolvent debtor, or one in failing circumstances, has been transferred to another by an illegal sale, it will be treated as though it had been disposed of without consideration and in fraud of the rights of the vendor's creditors. Counsel for Brower insist that we shall now go a step farther and declare that creditors of a solvent vendor may appropriate to the satisfaction of their claims property which has passed

out of his hands in execution of an illegal contract of sale. No decision is instanced in support of this contention, and we have been unable to find any that gives it the least countenance. In *Traders Nat. Bank v. Steere*, 165 Mass. 389, 393, it is said: 'The conveyance of property by a contract which is void as being against public policy in a particular which has no reference to creditors does not necessarily give creditors a right to pursue the property after the contract has been fully executed. Such a contract may or may not be fraudulent as against creditors. If it is, they may set it aside; if it is not, they cannot.' The sale here in question was not actually fraudulent as to creditors, and it should not be held to be presumptively fraudulent, in the absence of a showing that it was prejudicial to their rights. Huette, at the time of the sale to Fass, was neither insolvent nor in failing circumstances; at least, there is no evidence that he was, and, therefore, his creditors were affected by the illegal transfer, only as all other members of the community were affected. When an illegal contract has been executed and the parties thereto are *in pari delicto*, no action lies to recover back money paid under it, or for restitution of property delivered in pursuance of its terms; and this rule is applicable, not only to the parties themselves, but to all others claiming through or under them. Huette could not recover the property in dispute; he has no cause of action against Fass. Neither can Huette's creditors reclaim such property unless the sale and delivery of it to the plaintiff was actually, or by implication of law, an invasion of their rights."

In the case at bar, as in the case from which we have just quoted, at the time of the sale, the vendor was neither insolvent nor in failing circumstances; at least, there is no evidence that he was, and, on the authority of that case, his attaching creditors, or the defendant sheriff who stands as their representative in this litigation, are not in a position to attack the sale on the ground of illegality.

As the case must go back for a new trial it is proper

to notice some other matters which are likely to arise in the future. We seriously doubt whether the evidence shows that the goods were sold with the understanding that they were to be used in violation of the liquor laws of this state. There is no direct evidence of such understanding. Counsel for the defendant contends it is established, because it was agreed that an additional amount was to be paid to Tyler in case the plaintiffs were not required to take out a license in their own names, and because, after the sale, the plaintiffs ran the saloon for some time without taking out such license, and, consequently, in violation of law. We do not undertake to say that such facts would not warrant the inference that the parties to the contract of sale contemplated an illegal use of the goods at the time the sale was made. But we are satisfied that such inference is not the only one that may fairly be drawn from the evidence.

Both the plaintiffs and the intervener Coors, at the time of the sale, were residents of Colorado. The former had been engaged in the saloon business in that state, and the latter was engaged in the manufacture and sale of beer. The contract of sale was closed there. We cannot take judicial notice of the laws of Colorado, but the uncontradicted evidence is that a liquor license in that state is transferable. It may be inferred from the evidence that the parties, being ignorant of the laws of this state in that regard, made the provision with respect to placing the note for the remainder of the purchase price in *escrow*, not with a view to a violation of the laws of this state, but with a view to informing themselves with respect thereto, and intending to take out a license if the business could not be legally conducted without. If such were their intentions at the time of the sale, then the sale was legal, and would not be rendered illegal because the plaintiffs were subsequently engaged for a short time in selling intoxicating liquors contrary to the laws of this state, and making use of the property in such alleged traffic. It

would follow from what has been said that the trial court erred in directing a verdict in favor of the defendant sheriff.

There is no contest between the intervener Coors and the plaintiff, consequently it is unnecessary to go into the merits of the appeal filed by him. But there remains to be considered the appeal of the other intervener, whom we shall refer to as the "Company."

The evidence shows that in April, 1903 (one witness made an obvious mistake of a year), Tyler wrote the company that he wanted to buy a cash register. The company in response wrote him giving the price and the terms upon which they would sell him one. The terms were \$40 cash, and \$25 monthly, until the price was paid; the deferred payments to be secured by a contract to be executed by Tyler whereby the title to the register was to remain in the company until all payments had been made. On receipt of this letter, Tyler wired the company to ship the register, which it did at once, sending it by express, with instructions to the express agent at Alliance that it was to be by him delivered to Tyler upon payment by him of \$40 cash, and his signing the contract hereinbefore mentioned and the notes evidencing the deferred payments. The register was received by the express agent at Alliance sometime in May, 1903, and delivered to Tyler upon his payment of \$40 and signing the notes for the deferred payments. His signature to the contract was in some way overlooked. Upon discovering that the contract had not been signed by Tyler, the company insisted upon his signature thereto, and continued to insist until after the attachments in question had been levied. It has never returned, nor offered to return, the cash payment or the notes for the deferred payments. The company therefore is not in a position to treat their sale to Tyler as rescinded. By retaining the cash consideration and notes they must be held to have ratified the sale. That being true, the most favorable view that may be taken of its case is that the sale was conditional. But as

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the plaintiffs had no notice, actual or constructive, of that fact and are *bona fide* purchasers, the alleged condition of the sale whereby the title remained in the company is void as to them. Comp. St. 1903, ch. 32, sec. 26. The court therefore properly instructed a verdict against the company.

It is therefore recommended that the judgment in favor of the plaintiffs and against the intervener, the National Cash Register Company, be affirmed, and that the judgment in favor of the defendant be reversed and the cause remanded for further proceedings.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment in favor of the plaintiffs and against the intervener, the National Cash Register Company, is affirmed, and the judgment in favor of the defendant is reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

CHRIS SORENSON, APPELLEE, v. ERWIN TOWNSEND, APPELLANT.

FILED NOVEMBER 10, 1906. No. 14,473.

1. **Contract: ACTION: GENERAL DENIAL.** In an action on an express contract the defendant may show under a general denial that the contract differed in terms from that pleaded, or that no contract was in fact made.
2. **Trial: INSTRUCTIONS.** Where the evidence adduced by the defendant tends to establish a particular theory, which, if established, constitutes a defense, he has a right to have such theory submitted to the jury.

APPEAL from the district court for Brown county:
WILLIAM H. WESTOVER, JUDGE. *Reversed.*

P. D. McAndrew and Kirkpatrick & Schwind, for appellant.

A. W. Scattergood and L. K. Alder, contra.

ALBERT, C.

The plaintiff (appellee) brought this suit to recover the remainder due on an alleged express contract of service. He alleges in his petition that in November, 1902, he entered into an oral contract with the defendants, whereby the defendants agreed to pay him the sum of \$60 for the service of himself and team; that under and by virtue of said contract the plaintiff served the defendants, by himself and team, from the 15th day of November, 1902, to the 10th day of June, 1903, and duly performed all his part of the said contract. But one of the defendants answered, and his answer is as follows: "Comes now the defendant, Erwin Townsend, and answering plaintiff's petition for himself, and no one else, says: (1) That he admits that he and defendant, Melvin Hagerman, were in partnership running a dray line in Fairfax, S. D., in the year 1902, and that they hired the plaintiff to work for them on their said dray line with his horses and wagon, and that plaintiff did work for them on said dray line during a part of each of the months set forth in plaintiff's petition, and that the said firm bought a lumber wagon of the defendant. (2) This defendant, further answering plaintiff's petition, says and alleges the facts to be that the said firm engaged and contracted with the plaintiff to work for them on their said dray line for the agreed sum of \$10 a month, and furnish board and lodging for himself and team, and that said firm fully complied with their part of the said contract in all particulars, and paid the plaintiff in full for said wagon and for all the said work and labor that the plaintiff performed for said firm, and fully settled with the plaintiff, and this defendant denies that there is any sum whatsoever due

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the plaintiff thereon. (3) Further answering plaintiff's petition, this defendant says he denies each and every material allegation in plaintiff's petition not herein specifically admitted, and denies that said firm of Townsend & Hagerman contracted with or agreed to pay the plaintiff for the services of himself and team on said dray line the sum of \$60 a. month, and denies that plaintiff worked and labored for said firm during all the time specified in plaintiff's petition." The jury were instructed on the theory that a reply in the nature of a general denial had been filed to the defendant's answer, but it does not appear in the record. The cause appears to have been submitted on the theory that the other defendant was not in court, and as no question is raised in that regard further reference to him is unnecessary. The plaintiff introduced evidence tending to establish the allegations of his petition and made a *prima facie* case. The answering defendant was sworn as a witness, and from his testimony it would seem that the negotiations between the plaintiff and the defendants were conducted by him. He testified, in effect, that in his first conversation with the plaintiff with respect to entering the employment of the defendants he informed the plaintiff that they could not pay him more than \$40 a month; the plaintiff insisted on \$60 for the first month, whereupon the defendants informed him that they would give \$60 for the first month, and \$40 a month afterwards, and it was agreed between them that the plaintiff would enter their employment on those terms; that plaintiff did not proceed under this agreement, but before commencing to work for the defendants made a new contract with them, whereby it was agreed that the plaintiff should work for the defendants one month for \$60, no reference being made to his employment or the wages he should receive after that time; that plaintiff entered their employment with that understanding, and at the expiration of one month the answering defendant informed him that they could not pay him \$60 a month thereafter, but would pay him \$40

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a month, to which the plaintiff replied, "All right," and continued to work for them. The court instructed the jury that they should wholly disregard the testimony with respect to the agreement entered into between the parties at the end of the first month for the reason that no new contract was pleaded. The defendant excepted to this instruction, and now asks a reversal of the judgment on the ground that this instruction was erroneous.

We think the instruction is erroneous. The plaintiff declared on an express contract. The contract is, in effect, that the plaintiff undertook to work for the defendants for an indefinite length of time for \$60 a month, and that in pursuance thereof he worked for them a certain length of time. The burden was upon him to establish those facts. When he had made a *prima facie* case it was perfectly competent for the defendant to overcome it by showing that the contract, instead of being for an indefinite period, was for a period of one month, and that the services rendered after the expiration of that month were rendered under a new contract whereby the plaintiff, instead of receiving \$60 a month, was to receive \$40. This evidence was competent under defendant's general denial, because it is well settled that in an action upon a contract the defendant may show under a general denial that the contract was a different one from that set out in the petition, or that no contract at all was made. 1 Ency. Pl. & Pr. 818.

It would seem that in giving the instruction in question the trial court proceeded on the theory that the defendant's evidence tended to show a modification of an existing contract, but we do not think that is a correct theory of the defense. The defendant's evidence tends to show, not a modification of the contract, but that after the original contract had by its own terms expired the plaintiff continued in the employment of the defendants by virtue of a new contract whereby he was to receive \$40 a month. This appears to have been one theory of the defense, and as there was evidence tending to establish it the

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defendant had a right to have it submitted to the jury. That theory is covered by a general denial, hence, the fact that it does not strictly conform to the contract set out in the answer does not render the evidence inadmissible nor warrant its exclusion from the jury. The evidence was admitted without objection and tends to negative the plaintiff's cause of action. Its exclusion, we think, constitutes reversible error.

Another complaint is that the court erred in permitting the plaintiff to testify to the contents of a certain letter written to him offering him employment, and stating the terms upon which the defendants would employ him. The contention now is that this letter was not acted on, but that the parties subsequently entered into new negotiations, which were all merged in the oral contract finally entered into between them. There is testimony tending to show that the letter was the basis of the negotiations between the parties and that the offer therein made was never withdrawn. Consequently, we think there was no error in the admission of this evidence.

Another complaint is that the court permitted the plaintiff to testify that at or about the time he quit work for the defendants they were financially embarrassed and unable to meet their obligations. This line of testimony was really brought out by defendant. On cross-examination of the plaintiff he laid great stress on the fact that plaintiff had not presented his claim to the defendants for payment before bringing suit, and an explanation of such omission seemed in order. The testimony now complained of is such explanation, and taking into account the nature of the cross-examination, which was of doubtful propriety, we think there was no error in admitting this testimony.

For the errors in the instruction hereinbefore mentioned, we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

DUFFIE and JACKSON, CC., concur.

GILLIS v. Paddock.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

H. WADE GILLIS, APPELLANT, v. SARAH E. PADDOCK, ADMINISTRATRIX, APPELLEE.

FILED NOVEMBER 10, 1906. No. 14,460.

Trial: DIRECTING VERDICT. Where the evidence upon a question of fact material to the issue is conflicting and such that reasonable minds might reach different conclusions, the question is one for the jury, and it is error for the court to direct a verdict.

APPEAL from the district court for Burt county: ABRAHAM L. SUTTON, JUDGE. *Reversed.*

Jefferis & Howell, for appellant.

Hopewell & Hopewell, contra.

JACKSON, C.

The action is one on a promissory note executed by Solomon Paddock. It appears that Paddock was under arrest at the time the note was given, charged with murder. The plaintiff is an attorney at law, and took the note in consideration of services to be rendered the maker in the defense of his case. Some days later, and prior to the date fixed for the preliminary examination, Paddock took his own life while confined in the county jail. At the close of the trial the district court directed a verdict for the defendant, and the plaintiff appeals.

The position of the defendant is thus stated in the brief filed on behalf of the estate: "First. The note is fraudulent and void, being procured by undue influence of plaintiff over the maker Solomon Paddock, the relation

of attorney and client existing between them at the time of its execution. Second. There is a failure of consideration, the services contracted for not having been performed." It appears from the record that on November 27, 1903, Solomon Paddock, while in a drunken condition, killed his own son. He was taken into custody and placed in the county jail. The coroner of the county was notified, and was at the jail preparing to go to the scene of the homicide for the purpose of holding an inquest. The plaintiff was called over the telephone by the sheriff of the county, who advised him that Paddock desired to see him. After a moment's conversation with the prisoner he left the jail for the purpose of attending the inquest, which was held at a late hour in the night season. On the next morning the plaintiff again visited Paddock in the jail. From the testimony of Honorable W. G. Sears, one of the judges of the district court for Burt county, it is shown that he was in the jail at the time for the purpose of a conference with the sheriff, and that he was called into that portion of the jail where Paddock was confined, and it was there stated, either by Paddock or the plaintiff, that Paddock was about to execute a note for the sum of \$1,000, payable to the plaintiff, in consideration of which the plaintiff was to represent the accused in whatever courts the case might appear and defend him against the charge of murder; that the sum of \$1,000 was to be in full for all services so performed; that Paddock desired a witness to the agreement, and Judge Sears was asked by the accused whether the contract was binding and the plaintiff could recover more than the sum of \$1,000 for his services; after being assured, both by Judge Sears and the plaintiff, that no more than \$1,000 could be collected on the contract, the note was executed. The plaintiff delivered to the accused a written memorandum, signed by himself, containing the substance of the agreement.

It is urged on behalf of the estate that the contract of employment was entered into on the evening of November 27, and that the contract for the fee after the relationship

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of attorney and client is established is presumably fraudulent, and that no recovery can be had in excess of the value of the services rendered. There is testimony in the record tending to show that the amount of fee agreed upon for the services which the plaintiff agreed to perform was not unreasonable, and it is in effect conceded upon the argument that the contract in that respect was not unjust. Under that state of facts the case should have been submitted to the jury with proper instructions to determine when the contract of employment was in fact made, whether the fee agreed upon was reasonable, and the amount, if any, which the plaintiff should recover.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

THOMAS GROCHOWSKI, APPELLEE, v. MICHAEL GROCHOWSKI
ET AL., APPELLANTS.*

FILED NOVEMBER 10, 1906. No. 14,467.

1. **Contract: VALIDITY.** A promise made in consideration of an agreement to refrain from resisting the probate of a will is not void as against public policy where no persons or interests other than the persons and interests of the contracting parties are prejudicially affected thereby.
2. ———: **SPECIFIC PERFORMANCE.** Such a promise is not without consideration and will be enforced.

APPEAL from the district court for Cuming county: GUY
T. GRAVES, JUDGE. *Affirmed.*

*Rehearing denied. See opinion, p. 510, *post*.

R. E. Evans, for appellants.

A. R. Oleson, *contra*.

JACKSON, C.

On February 25, 1897, John Grochowski died leaving a will by the terms of which he bequeathed \$100 to St. Mary's Catholic Church at West Point, \$15 to his son Thomas Grochowski, \$200 to each of the five children of Thomas Grochowski, \$1,000 to his grandson Mike Grochowski, \$1,500 to his daughter Mary, and the remainder of his estate, including a farm of 160 acres, to his son Michael Grochowski, on the condition that the son Michael provide for the widow of the deceased during her lifetime. The son, Michael Grochowski, was appointed executor of the will. The will was proposed for probate in the county court of Cuming county, and the son Thomas appeared with his attorney for the purpose of contesting the will. Negotiations between the brothers, Michael and Thomas Grochowski, led to the following written contract: "Whereas, John Grochowski, in the seventh item of his last will and testament, bequeathed his farm, consisting of 160 acres, to his son Mike Grochowski upon certain conditions therein stated, and, whereas, said will was on this day offered for probate in the county court of Cuming county, Nebraska, and, whereas, Thomas Grochowski objected to the probate of said will: Now, therefore, for the purpose of avoiding litigation it is hereby agreed by and between the said Mike Grochowski and Thomas Grochowski that the said Thomas Grochowski withdraw all objections to the probating of said will and in consideration thereof that said Mike Grochowski hereby agrees with the said Thomas Grochowski that he will fulfil all the conditions and stipulations contained in the said seventh item in the last will and testament of the said John Grochowski, and after the death of their mother named in said item, he will divide whatever is left of the

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farm named in said item or from the proceeds of the sale thereof with the said Thomas Grochowski, but said property is not to be sold by the said Mike Grochowski, unless it is necessary to do so for the purpose of supporting their mother in the manner provided in said seventh item of said will, unless with the consent of said Thomas Grochowski. Dated at West Point, April 5, 1897. Chas. McDermott, P. F. O'Sullivan, Peter Hasler, Mike Grochowski, Thomas Grochowski." The widow of John Grochowski died in 1902, and on February 24, 1903, this action was instituted by the plaintiff to enforce a specific performance of the contract with his brother Michael.

In the petition it was alleged that the contract, as agreed upon between the parties, included the residue of the personal estate of the deceased as well as the 160 acre farm, but by mistake of the scrivener the personal estate was omitted from the written agreement, and the prayer included a request for a reformation of the contract, an accounting of the personal estate, and the conveyance of an undivided one-half interest in the land. In the answer it is alleged that Mary Grochowski, daughter of the deceased and one of the legatees, was at the death of her father, and still is, an insane person, that she took no part in the compromise and settlement between the brothers, Thomas and Michael Grochowski, and for that reason the compromise and agreement between the brothers was void as against public policy; that the contract was without consideration; that the estate had not been fully settled, and the action was prematurely brought. At the trial, and after the plaintiff had rested, the defendant was permitted to amend his answer. In the amendment it was charged that the actual agreement between the brothers, Thomas and Michael Grochowski, was that in consideration of the withdrawal of the objections to the probating of the will by the brother Thomas, and an agreement by Thomas Grochowski to care for and keep their mother one-half of the time during the remainder of her life, the defendant would upon the death of the mother convey

one-half interest in the farm to the plaintiff; that by mistake the scrivener omitted the provision providing for the care of the mother one-half of the time by the plaintiff; and the prayer included a request for the reformation of the contract to that effect. It was alleged that the plaintiff had neglected and refused to perform the conditions of the contract on his part, and had never contributed toward the support of the mother; by reason of such refusal the defendant had been compelled to provide and had provided for the mother at his own expense. The decree of the district court gave the plaintiff an undivided one-half interest in the real estate and quieted the title in him to that extent. The court found specifically that in consideration of the care of the widow and the expenses incident to her maintenance the defendant was entitled to hold and receive all of the moneys and other property of the estate of the deceased received by him, and the rents of the real estate to March 1, 1905, and taxed the costs, one-half to each litigant. The defendant appeals.

The claim that the compromise and contract is void as against public policy does not seem to be well taken. It appears from the evidence that, while the contract was drafted in a law office in the city of West Point, yet it was revised and signed in the office of the county judge of Cuming county where the probate proceedings were then pending. A clerk in the county judge's office assisted in revising the agreement at the suggestion of the parties, and presumably the adjustment of the entire matter was had with the knowledge of the county judge. The rights of no persons other than the contracting parties were prejudicially affected, nor did the settlement affect the due administration of justice. There is no evidence of a connivance to defeat or defraud the insane sister of any of her rights. She was not a necessary party to the agreement, and we find no reason for disturbing the decree of the trial court in so far as it sustains the validity of the contract and the terms thereof as contended for by the plaintiff.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

The following opinion on motion for rehearing was filed May 10, 1907. *Rehearing denied:*

1. **Contract: VALIDITY.** A contract whereby one interested in defeating the probate of a will agrees to interpose no objection thereto is not void as against public policy, unless made collusively and in fraud of other parties interested in the estate.
2. ———: **CONSIDERATION.** Where opposition to the probate of a will is made by such party in good faith, a withdrawal of such opposition is a valid consideration for a promise on the part of one interested in sustaining the will.
3. **Evidence examined, and held** sufficient to entitle the plaintiff to a decree.

ALBERT, C.

This case is before us on rehearing. The former opinion is reported *ante*, p. 506, where the facts involved and the issues raised by the pleadings are stated at some length. It is again strenuously contended that the contract is void as against public policy. Authorities are not wanting to sustain that contention, but we think the better considered cases are the other way. *Seaman v. Colley*, 178 Mass. 478, 59 N. E. 1017, is similar in some respects to the case at bar. In that case the plaintiff and others contested the probate of a codicil to a will, and the findings of the lower court that the codicil was procured by the undue influence of the defendant was set aside. When the case was called for a new trial plaintiff, in consideration of defendant's agreement to pay him \$500, withdrew his opposition, and without knowledge of the agreement the court admitted the codicil to probate. The only other interested party was a weak-minded son of the testator. There was no evidence of any connivance between the parties to defraud the testator's son or that he was influenced by the plaintiff's withdrawal of his oppo-

sition to the probate of the instrument. On appeal to the supreme judicial court it was held that the agreement was not void as against public policy. In the body of the opinion the court said:

"The other next of kin was a weak-minded son of the testator, who was under guardianship, but it does not appear that his conduct or that of any other person than the parties to the bargain was influenced, or was expected or even likely to be influenced, by the plaintiff's course. It does not appear that the other parties to the appeal were not informed of the plaintiff's arrangement and of the motives which induced his change. * * * The will and codicils are not before us, and it does not appear that there was any other interest to be affected. The only ground on which it can be argued that the bargain was against public policy is that such bargains cannot be made without informing the court, for, if the matter had been known to everyone, it would be absurd to say that the plaintiff was not free to consult his own interest in opposing or withdrawing opposition to the codicil, as well for money as without it. Indeed such arrangements as the present have been said to be entitled to the highest favor of the courts." Citing *Leach v. Fobes*, 11 Gray (Mass.), 506. See also *Rector, Church Wardens and Vestrymen of St. Mark's Church v. Teed*, 120 N. Y. 583, 24 N. E. 1014; *Barrett v. Carden*, 65 Vt. 431, 36 Am. St. 876; *In re Estate of Garcelon*, 104 Cal. 570, 43 Am. St. 134.

In the case at bar, as in the Massachusetts case, one of the heirs at law was a feeble-minded child of the testator. In the Massachusetts case it was said that "it does not appear that his (the weak-minded son's) conduct * * * was influenced, or was expected, or even likely to be influenced by the plaintiff's course." In the case at bar the contract was made in the presence of the court. It was made openly and without any effort at concealment. We cannot presume that the court would be a party to any arrangement that would operate as a fraud on the weak-minded sister or any other person interested in the estate.

That being true, we know of no rule of public policy requiring us to hold the contract void and of no effect

Another contention of the appellant is that the contract was without consideration. The argument in support of this contention proceeds on the theory that at the time the contract was made the plaintiff had no valid ground for opposition to the probate of the will, and that the ground upon which he did oppose it was so obviously untenable that there could be no difference of opinion among reasonable men with respect to it. At the time the contract was made the plaintiff had filed no formal objection to the probate of the will. The objection that he made orally to the court and in his conversations with the defendant was that he had been "slighted" and was entitled to a greater share of the testator's estate. It appears to have been made in good faith. The grounds upon which he based this objection are not very definite. His position at the time was not that of one who had entered a contest, but of one who contemplated doing so. That presupposes examination and investigation. It does not necessarily presuppose examination and investigation to defeat the will in its entirety, but to modify the provisions of the will relating to himself on the ground of mistake or for some other reason. By the contract in question the plaintiff agreed, in effect, to forbear such investigation and to allow the will, so far as he was concerned, to be admitted to probate without objection. The case in this respect does not differ in principle from one where the line between adjoining landowners is indefinite and uncertain, and the parties to avoid the expense of investigation agree upon and establish a boundary. In such case the line agreed upon will be sustained, although it may be subsequently found to vary from the true line. *Lynch v. Egan*, 67 Neb. 541. In the case at bar, as in the case just cited, the rights of the parties to the contract were uncertain, and could be ascertained only at considerable expense and inconvenience to each of them. To avoid such expense and inconvenience they entered into the contract in suit, the plain-

tiff agreeing to forbear opposition to the probate of the will, and the defendant, in consideration thereof, to make a division of the real estate after the mother's death. The promise of each was a sufficient consideration for the other.

The defendant further contends that the contract found by the court is not the contract pleaded by the plaintiff nor the one shown in evidence. The finding upon which this contention is based is as follows: "The court further finds that, in consideration of the care of his mother and the expenses incident to her maintenance and all other expenses incident thereto by the said Mike Grochowski, the said Mike Grochowski is entitled to hold and receive all the moneys and other property of the estate of John Grochowski received by him, and the rents by him received to March 1, 1905, upon said described premises, and that the same shall be in full of all claims against said estate and Thomas Grochowski by reason of such expense in connection with the care and maintenance of their said mother." With respect to this finding the plaintiff says in his brief: "The court takes an accounting from only a partial statement of the condition of the estate of John Grochowski, deceased, and assigns the entire personal estate to the defendant to pay for the care of the mother, and then assigns a one-half interest in the farm to the plaintiff. Where is the warrant for such a decree? In order to understand the finding just quoted, it should be kept in mind that the plaintiff was asking a reformation of the contract to include the residue of the personal estate of the testator, as well as the land described in the contract. The defendant claimed that the actual contract between himself and the plaintiff contained a provision to the effect that they should jointly provide for their mother. This was denied by the plaintiff. The defendant is the residuary legatee. Item seven of the will expressly imposes upon the defendant the duty of providing for the wife of the testator, who is the mother of the parties to

this suit. The written contract between the parties expressly provides that the defendant will fulfil all the conditions of that item of the will, and after the death of the mother "will divide whatever is left of the farm named in said item, or the proceeds of the sale thereof." with the plaintiff, but that the land is not to be sold unless necessary for the support of the mother. To our minds the contract clearly contemplates that the mother should be supported out of the income derived from the land or, in case that should be insufficient, out of the proceeds realized from the sale thereof. The evidence shows that the rents and profits were sufficient for that purpose. While it would appear from the finding of the court with respect to the residue of the personal estate that it was awarded to the plaintiff in consideration of his support and maintenance of the mother, it was in fact intended to dispose of the plaintiff's contention that by the terms of the actual contract between himself and the defendant he was to share in the residue of the personal estate.

Another contention of the defendant is that the district court was without jurisdiction, because the case involved the settlement of the accounts of an executor. The court was not attempting to settle the accounts of the executor, but, as we have already seen, to dispose of the plaintiff's contention that he was entitled to an equal share with the defendant in the residue of the personal property, and to ascertain the expense incurred by the defendant in supporting the mother according to the provisions of the will in order to make a just distribution of the real estate according to the terms of the contract between the parties.

Another claim put forward by the defendant is that the suit was prematurely brought, because there had been no final settlement of the testator's estate. This suit involves certain real estate. It affects only the parties to it. The record shows that all the debts of the estate have been paid, and that the personal estate is ample to pay the bequests under the will and all expenses of administration. It will not be necessary, therefore, to resort to the real

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estate. By the terms of the contract the real-estate was to be divided between the parties to this suit on the death of the mother, and she had died before the suit was instituted. On this state of facts there was no occasion for delay, and, as the suit binds only the parties to the record and their privies, there is no danger that others will suffer by the decree.

The evidence to sustain the decree is ample and convincing. We see no escape from the conclusion reached by the district court, and we therefore recommend that the motion for rehearing be overruled.

JACKSON, C., concurs.

By the Court: Motion for rehearing

OVERRULED.

BRAINARD & CHAMBERLAIN, APPELLANTS, v. BUTLER, RYAN
& COMPANY ET AL., APPELLEES.

FILED NOVEMBER 10, 1906. No. 14,485.

1. Justice of the Peace: JURISDICTION. Defective notice of a conditional order vacating a default judgment before a justice of the peace does not deprive the justice of jurisdiction over the subject matter, and he may, on application of the moving party, continue the hearing for proper notice.
2. ———: ———: WAIVER. An objection to the jurisdiction over the subject matter is a waiver of objection to jurisdiction over the person.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

L. H. Bradley, for appellants.

James B. Sheean, O. O. Wright and B. H. Dunham,
contra.

JACKSON, C.

The action was instituted before a justice of the peace, an order of attachment was issued and levied on personal property, service was by publication, there was no appearance by the defendant, and judgment was entered August 15, 1903. On the 25th of the same month the defendant filed a motion to set aside the judgment by default, and offered to confess judgment for costs. A conditional order was that day entered, and hearing set for September 1. On September 1, at the hour fixed for the hearing, the defendant appeared, the plaintiff not appearing, and it having been discovered that the notice of the conditional order was defective, the defendant requested a continuance for the purpose of serving a new notice, and the case was continued to September 7. A new notice was served on September 1. On September 7, which was a legal holiday, the justice entered an order adjourning the hearing to the following day, at the same hour on which the hearing was set for September 7. The defendant appeared on the 8th, plaintiff failed to appear, the conditional order was made absolute, and on application of the defendant the case was continued for trial to September 16. On the latter date the plaintiff appeared specially, objecting to the jurisdiction of the court, and the case was adjourned to September 23, 1903. On September 23 the defendant again appeared with a motion to recall an order of sale which had been issued on the attachment, and the case was again continued to September 24, 1903. at 1 o'clock P. M. On September 24, at 2 o'clock P. M., the plaintiff filed another special appearance and objection to the jurisdiction of the court, which was overruled, and, declining to appear further, the order of sale of attached property was recalled and the case dismissed for want of prosecution. The plaintiff took error to the district court, where the judgment of the justice was affirmed, and the case is now brought to this court for review.

The objection to the jurisdiction filed on September 24

is as follows: "Now come the plaintiffs by their attorney and enter their special appearance for the sole purpose of presenting the following motion herein, to wit: The plaintiffs move the court to set aside and set at naught all orders or entries made herein subsequent to the entry of the judgment herein on the 15th day of August, 1903, for the reason that the defendant not having complied with the statute of Nebraska in such case provided, by not having given the notice required by such statute to be given to the plaintiffs. The said R. G. King as such said justice has not had and now has no power or authority in law to make any order or orders in said cause subsequent to said 15th day of August, 1903, the justice being without legal jurisdiction so to do either as to the parties or subject matter in suit." It is the contention of the plaintiff that, the first notice of the conditional order having been defective, the proceedings of September 1, 1903, terminated the controversy, and that the justice of the peace was without further jurisdiction to proceed; that the order of that date in the following language: "It appearing to the court that the notice of reopening judgment served upon plaintiff is defective, the same is hereby quashed. Defendant filed an affidavit for continuance for the purpose of serving a new notice of the reopening of judgment, thereupon cause adjourned to September 7, 1903, at 1 o'clock P. M."—amounted to an adjudication against the defendant's right to further proceed. This contention cannot be sustained. The provision of the statute controlling the action of the justice in such cases requires: "First.—That his motion be made within ten days after such judgment was entered. Second. That he pay or confess judgment for the costs awarded against him. Third. That he notify in writing the opposite party, his agent, or attorney, or cause it to be done, of the opening of such judgment and of the time and place of trial, at least five days before the time, if the party reside in the county, and if he be not a resident of the county, by leaving a written notice thereof at the office of the justice ten days before the

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trial." Code, sec. 1001. This statute does not require, as seems to be urged by the plaintiff, that the entire proceeding be had within ten days after the entry of the judgment. The motion and offer to confess judgment for costs must be filed within the ten days, but time must thereafter be given for the service of a proper notice. *Smith v. Riverside Park Ass'n*, 42 Neb. 372. The justice acquired jurisdiction over the subject matter of the motion on account of its having been filed within ten days allowed by law for that purpose, and the fact that the first notice of the order was defective did not deprive that court of jurisdiction. It was clearly the duty of the court to continue the case for proper service upon the application of the defendant.

Again, it is urged that the second notice was insufficient in point of time, for the reason that September 6 was Sunday, and September 7 a legal holiday, and that five days did not intervene between the date of making the order, September 1, and the date of the hearing, September 7. It is evident that this contention is not well taken. The order having been returnable on September 7, a legal holiday, the motion, under the law, stood for hearing at the same hour of September 8. It is true that the court had no jurisdiction to make the order on September 7, but no such order was necessary; the case stood for hearing on the following day by operation of law. Furthermore, the objection was something more than an objection to the jurisdiction over the person of the plaintiff. It included an objection to the jurisdiction over the subject matter, and such an objection is a waiver of all objection to the jurisdiction of the court over the person. *Perrine v. Knights Templar's & M. L. I. Co.*, 71 Neb. 273; *Bankers Life Ins. Co. v. Robbins*, 59 Neb. 170.

It is evident that the judgment of the district court was right, and we recommend that it be affirmed.

DUFFIE and ALBERT, CC., concur.

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By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

BENJAMIN F. RUSSELL V. STATE OF NEBRASKA.

FILED NOVEMBER 22, 1906. No. 14,626.

1. **Courts: ADJOURNMENT.** The judge of the district court has power for sufficient reason to adjourn a regular term of court to a future time or without day, and this may be done by an order to that effect sent to the clerk of the court before the time fixed for holding the regular term.
2. ———: **SPECIAL TERM.** The judge of the district court may call a special term for the transaction of the general business of the court *if he deem it necessary.*
3. **Jurors: SPECIAL VENIRE.** When the regular panel of petit jurors is quashed for any reason, the district court may order jurors to be summoned under section 664 of the code.
4. **Seduction: EVIDENCE.** In a prosecution for seduction, evidence of specific acts of lewdness on the part of the prosecuting witness is incompetent. If the prosecuting witness was of good repute for chastity prior to the alleged seduction she is within the protection of the statute. The evidence upon this point should be confined to general reputation for chastity.
5. ———: ———. A teacher's certificate held by the prosecutrix at the time of the alleged seduction is not competent evidence of reputation for chastity.
6. ———: **PROMISE OF MARRIAGE.** The crime of seduction is not complete unless the illicit intercourse is had under promise of marriage. The promise must be an unconditional one. It must be of such character and made under such circumstances that the one to whom it is made might reasonably rely upon it. A promise conditioned upon pregnancy as the result of such illicit intercourse is not such promise.
7. ———: **CORROBORATIVE EVIDENCE.** The requirement of the statute that the evidence of the female must be corroborated relates both to the act of illicit intercourse and the promise of marriage, and the existence of one of these facts does not necessarily prove the

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existence of the other, nor does it furnish the corroboration required by the statute.

8. ———: ———. The circumstances relied upon as corroborating the evidence of the prosecuting witness as to the promise of marriage must point so plainly to the truth of her testimony and be of such probative force as to equal the testimony of a disinterested witness.
9. **Criminal Law: INSTRUCTIONS.** If a defendant in a criminal case is a witness in his own behalf, it is error to instruct the jury that, "if the defendant by his own testimony has not denied in any way any material fact proved in the case within his personal knowledge, such testimony or material fact proved, if not denied by the defendant, is admitted by the defendant to be true." *Comstock v. State*, 14 Neb. 205, *distinguished*.

ERROR to the district court for Frontier county: ROBERT C. ORR, JUDGE. *Reversed*.

W. S. Morlan and J. L. White, for plaintiff in error.

Norris Brown, Attorney General, W. T. Thompson, L. H. Cheney, C. H. Tanner and J. L. McPheeley, *contra*.

SEDGWICK, C. J.

In the district court for Frontier county this defendant was convicted of the crime of seduction, and by these proceedings has brought the judgment of conviction here for review. This crime is defined by section 207 of the criminal code. One of the principal contentions of the defendant is that the conviction is not supported by the evidence. In disposing of that question, the evidence in the case will be referred to so far as may be necessary to that discussion.

1. It appears from the record that, in fixing the term of court in that county for the year in which this trial was had, the judge of the district court ordered that the first term of the district court should be held, commencing on the 5th day of March. And afterwards the judge sent from McCook two orders to the clerk of the district court for Frontier county, one of them canceling the regular term for that year, and the other ordering a special term

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to transact the general business of the court. The manifest purpose of these two orders was to change the date and hold the term one week earlier. There is, of course, no doubt of the authority of the judge to postpone the regular term of court if good reason appears for so doing. He may, for sufficient reason adjourn the regular term without day. The statute, section 4735, Ann. St., authorizes the calling of a special term of court in the following words: "A special term may be ordered and held by the district judge in any county in his district, for the transaction of any business, if he deem it necessary. In ordering a special term he shall direct whether a grand or petit jury, or both, shall be summoned." This would seem to be sufficient authority for the action of the court in calling a special term, and the defendant cannot complain of such action unless he can make it appear that in some particular the statute has been violated. In the order calling a special term, the judge directed that a petit jury should be summoned. This was done, and the defendant moved to quash the panel. This motion was sustained, and the court then ordered the sheriff "to summon 24 persons, good and lawful men, from the body of Frontier county, having the qualifications of jurors, to appear forthwith and serve as jurors for this present term of court." This practice is justified by the provisions of section 664 of the code, which has been many times so construed by this court. We do not want to be understood as recommending the practice of changing the time of holding the regular term of court after the same has been fixed as the law provides. The law does not appear to contemplate such changes for trivial and insufficient reason. If the method pointed out by the statute for securing jurors is disregarded, no doubt the defendant may object to being tried upon a criminal charge before the jury so obtained. In such case the law will presume prejudice. If, however, the provisions of the statute have been complied with, and no prejudice to the defendant appears, it will be presumed that the court had sufficient reason for changing the time of holding the term.

This objection of the defendant, then, was properly overruled.

2. Upon the trial of the case the plaintiff showed that the prosecuting witness had been engaged in teaching school, and then offered in evidence her teacher's certificate, after having shown that it was regularly executed by the county superintendent and delivered to the prosecuting witness. It is now objected that this evidence was incompetent, and we think that there is merit in this objection. In the brief for the state it is said that this certificate was not offered "for the purpose of proving the general reputation of the prosecutrix for chastity. * * * The certificate, though it recites * * * *'to be a person of good moral character,'* was offered as proof only, and to corroborate other testimony, that the prosecutrix at the time was engaged in teaching school under the proper authority, it being a paper authorized to be issued under the laws of Nebraska." It is impossible to say from this record what the counsel for the state had in mind when this certificate was offered. No suggestion appears to have been made at the time that it was offered for any special purpose. The fact that the prosecuting witness was engaged in teaching school was already in evidence, and, if true, was not likely to be contradicted as it could, of course, be absolutely substantiated. This fact was not so material to the prosecution as to make it necessary to show what the qualifications of the prosecutrix as a teacher might be, nor that she was duly authorized to teach, and the evidence in question could have had no effect in the interest of the state unless intended to show that the prosecutrix was of good repute for chastity. For that purpose it was clearly incompetent. The evidence of the county superintendent upon that point in this criminal trial was of no more importance than the evidence of other witnesses, and ought in like manner to be subjected to cross-examination.

3. The defendant complains that he was not allowed upon the trial to prove specific acts of lewdness on the

part of the prosecutrix for the purpose of establishing her want of chastity. The statute under which this prosecution is brought provides: "Any person over the age of eighteen years, who, under promise of marriage, shall have illicit carnal intercourse with any female of good repute for chastity, shall be deemed guilty of seduction, and upon conviction, shall be imprisoned in the penitentiary not more than five years, or be imprisoned in the county jail not exceeding six months, but in such case the evidence of the female must be corroborated to the extent required as to the principal witness in case of perjury." Cr. code, sec. 207. It would seem that the language of our statute is sufficiently explicit to determine this question. Indeed, the language is so plain upon this point that it leaves no room for construction. Any female who is of good repute for chastity is within the protection of the statute. No condition is made that she must have deserved that reputation by a correct and pure life, and we cannot extend the statute by construction beyond its plain meaning. Similar statutes in other states have been so construed. *Bowers v. State*, 29 Ohio St. 542; *State v. Bryan*, 34 Kan. 63. In some of the states the statutes defining this crime are essentially different from ours. By the Missouri statute it is made a crime for any person "under promise of marriage" to "seduce and debauch any unmarried female of good repute." Under statutes like this there has been some difference of opinion as to the proper construction of the word seduce. Some courts have held that this word in itself means to corrupt and to draw aside from the path of virtue, and that one cannot be drawn from the path of virtue unless she is honestly pursuing that path, and that the charge of seduction involves the allegation that the woman seduced was at and prior to the time of her ruin of pure character and leading a virtuous life, so that in making such allegations she must be prepared upon the trial to establish its truth. *State v. Reeves*, 97 Mo. 668. Other courts perhaps have taken a different view, and have held

that the words "of good repute for chastity" indicate that the general reputation of the prosecutrix can be shown, but not specific acts of immorality. A statute which provides that the female must be of "previous chaste character" is, of course, also essentially different from ours. Our statute does not make it necessary to prove that the defendant has seduced his victim in the common law meaning of that word. The statute itself defines what shall be seduction. If the defendant was over 18 years of age and under promise of marriage had unlawful intercourse with a female of good repute for chastity, he is guilty of seduction without regard to whether the female so seduced was entitled to that good reputation. This contention of the defendant was properly overruled.

4. The defendant requested an instruction to the jury to the effect that, if the illicit intercourse was procured under a promise on the part of the defendant to marry the prosecutrix in case such intercourse should result in pregnancy, this would not be such a promise of marriage as the law contemplates, and the defendant should be acquitted. The law is correctly stated in this request for an instruction. A satisfactory reason for such a rule of law is given by the supreme court of Michigan in *People v. Smith*, 132 Mich. 58:

"Is a promise to marry, conditioned upon the illicit intercourse resulting in pregnancy, calculated to induce a pure woman to yield her chastity? In our judgment, this question admits of but one answer. Such a promise has no tendency to overcome the natural sentiment of virtue and purity. The woman who yields upon such a promise is in no better position than as though no promise whatever had been made. No wrong is done her if she is put in the class with those who commit the act to gratify their desire. She was willing to lose her virtue if some provision was made to conceal its loss. If pregnancy does not result from the illicit intercourse, her conduct is, in every respect, as culpable as that of her companion. If pregnancy does result, his con-

duct becomes more culpable than hers when, and not until, he refuses to marry her. The commission of the offence cannot depend upon the happening of a subsequent event."

See also *People v. Van Alstyne*, 144 N. Y. 361; *State v. Reeves*, *supra*; *Putnam v. State*, 29 Tex. App. 454, 16 S. W. 97; *State v. Adams*, 25 Or. 172, 35 Pac. 36. In some of the states from which these decisions are cited the statute is different from ours, in requiring proof that the female seduced was in fact of good character prior to the seduction, and not merely of good repute for chastity, but we do not see how this can make any difference in the construction of the statute upon the point now being discussed.

The reason urged for the refusal of the requested instruction is that there was no evidence justifying it. We do not take this view of the evidence. There was no direct evidence of a marriage contract of any nature except as testified to by the prosecuting witness. Whether this testimony was corroborated by circumstantial evidence will be considered later. According to the testimony of the prosecuting witness, the subject of marriage between them had never been mentioned directly or indirectly prior to the evening upon which it is alleged the crime was committed. They were riding in a buggy on the way from the home of the defendant to the boarding place of the prosecuting witness. She testifies that, when they had gone about a mile, he attempted to put his arm around her, but she prevented his doing so; that, a little later, he proposed that they have sexual intercourse. She several times refused, and then he said: "'We will get married, and no one will ever know it. Come on.' I told him 'No,' and, when we had only just crossed the Cedar, he turned and drove up into a little draw, and then he says: 'Well, come on. Nobody will ever know. Come on.' I told him 'No,' and he says: 'Well, come on. No one will ever know it. We will get married, and no one will ever be the wiser. No one will ever know it happened.' After

he had said it so many times, I submitted to him." According to her testimony, the only thing that was ever subsequently said between them in regard to marriage was more than two months later on the 8th of February. They were both alarmed about her condition. He had called at her house and brought her some medicine. She was going out, and as they were leaving the house she mentioned the matter. This is the way she states it in her testimony: "Before I got into the sled that evening, I said to him before he started, I said: 'What do you intend to do about that marrying deal?' He said: 'I have been teaching, and I haven't thought much about it.'" We think that under this evidence the jury might have found that, although there was no unconditioned contract of marriage between these parties, he promised her, and she so understood him, and was led by his promise to believe that they would hide their conduct and keep their shame from the knowledge of the world, and, if it was found to be necessary to that end, would enter the marriage relation. This was the defendant's theory of the view that should be given to the evidence of the prosecutrix if it was believed to be true, and he was entitled to have this theory submitted to the jury. This was not done by any instruction given by the court, and to refuse this request of the defendant was erroneous.

5. The statute requires that the evidence of the female be corroborated to the extent required as to the principal witness in the case of perjury. In *Gandy v. State*, 23 Neb. 436, this court said:

"In a prosecution for perjury the falsity of the testimony or oath of the accused, upon which the perjury is assigned, cannot be established by the testimony of one witness alone. It may be proved by the testimony of one reliable witness, and such corroborative facts and circumstances as will give a clear preponderance of the evidence in favor of the state if such preponderance excludes all reasonable doubt of the guilt of the accused. Such

corroborative facts or circumstances ought, at least, to equal the testimony of a single witness."

No doubt this provision of the statute relates both to the act of intercourse and the promise of marriage. The existence of one of these facts does not tend to prove the existence of the other so as to furnish the corroboration required by the statute. In this case the jury would have no doubt of the act of intercourse, but the promise of marriage was denied by the defendant. He was asked: "State what, if any, promises or offers, directly or indirectly, or otherwise, you ever made to Edna Richey to marry her," and answered: "I never referred to that, made no promises." He also stated that he never at any time or any place proposed to marry Edna Richey, nor did she ever propose such a thing to him. It is insisted that the evidence of the prosecuting witness upon this point is corroborated by circumstances proved, but we cannot find such corroboration in the record. Several times, when they were little children, they had opportunities to see each other. Afterwards, for several years, they had no knowledge of each other. Once the defendant attended a teacher's institute, and says the prosecuting witness may have been present, he thinks probably she was, but there is no evidence that there was any conversation between them or opportunity for such. There is evidence tending to show that on one or two occasions a few words passed between them such as might take place between casual acquaintances. There were no acts of even ordinary friendship between them. Within a very few minutes after the first advances of the defendant her ruin was accomplished, and the only suggestion of marriage on his part testified to by her was in the midst of the contention which resulted in her ruin. There had been nothing between them that suggested to any of their friends or acquaintances that they contemplated marriage, and she testifies that the first mention that she made of her engagement, even to her mother, was in the following May when she was compelled to admit

and explain her condition. In *State v. Richards*, 72 Ia. 17, it appears that the prosecuting witness was at the time of the alleged seduction living with the defendant's mother, and the defendant was living in the same family. She had been an inmate of this family on two occasions and several months at a time, and had the entire confidence of the defendant's mother. It was held that there was no corroboration of the evidence of the prosecuting witness as to a promise of marriage. In discussing the question the court said:

"This is the relationship and intimacy relied upon as tending to show that the defendant had gained control of the prosecutrix's affections, or at least had so far paved the way for a proposition of marriage as to relieve from strangeness a proposition made for the first time in the midst of a physical struggle for sexual intercourse. But, to our mind the relation seems to have been a mere family relationship, and such as exists in no small portion of all the households, and entirely consistent with absence of affection or show of affection. The case is noticeable for the want of attention on the part of the defendant. The prosecutrix lived in the family more than a year. During that time the defendant escorted her once to church and once to an entertainment at a public hall. We think that we should be going too far to say that the facts relied upon corroborated the prosecutrix."

If the corroboration is to be circumstantial evidence, the circumstances proved must point so plainly to the truth of her statement and be of such probative force as to equal the testimony of a disinterested witness. This is the rule stated in *Gandy v. State*, *supra*, and we do not feel it necessary to depart from it.

6. The defendant was a witness in his own behalf, and the court instructed the jury that "if the defendant by his own testimony has not denied in any way any material fact proved in the case within his personal knowledge, such testimony or material fact proved, if not denied by the defendant, is admitted by the defendant to be

true." It is insisted by the prosecutrix that this instruction is justified by the language of this court in *Comstock v. State*, 14 Neb. 205, but this is an error. In *Comstock v. State*, the defendant requested the court to instruct the jury that "The fact that the prosecution have not called a physician, or expert, to the fact of penetration of the person of the prosecuting witness, Coral Comstock, weakens the evidence of the prosecution in regard to the fact of penetration." The court held that it was not error to refuse this instruction. The principal reason given for this holding was that the evidence of penetration was so strong "that the prosecuting witness needed no support from physicians or experts." The thought of the court being that, if the evidence of that fact was already overwhelming, the state would not be held to have weakened that evidence by failing to make further proof upon the same point. After stating that the testimony on the point was "ample and left no reason for doubting that it took place," the court recite some of that testimony, which seems to have indeed been very strong, and they say:

"Besides, although the prisoner availed himself of the privilege of being a witness in his own behalf, and testified, he did not offer in a single particular to controvert what his daughters had sworn to respecting the fact of carnal connection. Had he not gone upon the witness stand, the fact of his not testifying against them would not have operated to his disadvantage, but having done so, his failure to deny what they said respecting a matter which must have been within his own personal knowledge, will be taken as an admission that it was true."

This does not mean that the jury must take it as an admission that it was true and that the court must so instruct. The meaning is that upon an argument of this kind the court will take that fact into consideration, because it would be natural for the trial court to have taken it into consideration in refusing to instruct the jury that

the failure to put experts upon the witness stand would weaken the testimony of the state upon a question that was so thoroughly established that no further testimony could have been thought necessary or even reasonable. To instruct the jury that defendant in a criminal case by a failure to deny any material matter that had been testified to against him must be held to have admitted its truth, would indeed be a strange doctrine. If upon a vital matter in a case, a matter that is of such great importance that it must be continually before the mind of the defendant, there is such ample proof in the case that it would be wholly unreasonable to offer further proof, and the defendant while on the stand fails to testify upon that matter, the court in considering the condition of the record, and determining therefrom the necessity or propriety of giving further instructions, might take into consideration the fact that the defendant had failed to deny the truth of a matter so thoroughly established. But, when the defendant under a charge of crime that may result in his imprisonment for a term of years goes upon the witness stand for the purpose of denying one of the material and essential elements of the case against him, it is not to be expected, much less required, that he have in mind all the material matters that may have been testified to in the case, and categorically deny everything of importance that has been said against him. The instruction given by the court in this case was to that effect and was clearly erroneous.

7. Other errors are complained of, and, indeed, it would appear that the prosecuting witness was allowed to testify to the contents of writings which she had sent to the defendant, and which apparently were then in his custody, without requiring the state to show that any attempt had been made to procure the writings themselves. The court once remarked in the presence of the jury that he considered certain evidence given by one of the state's witnesses as the strongest kind of evidence. If this cause should be retried it is not to be presumed that

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these and similar errors will be repeated, and it is therefore not thought necessary to discuss them further.

For the reasons given, the judgment of the district court is reversed and the cause remanded.

REVERSED.

GEORGE S. MCCAGUE, APPELLEE, V. LEONE ELLER ET AL.,
APPELLANTS.

FILED NOVEMBER 22, 1906. No. 14,519.

1. **Mortgages: FORECLOSURE: REDEMPTION.** The right of redemption of real property from a mortgage debt and the right to extinguish that right by judicial foreclosure are mutual and reciprocal.
2. ———: **SECOND FORECLOSURE.** When the owner of a mortgage upon real estate acquires by judicial foreclosure and sale the legal title to all the mortgaged property, leaving an unpaid residue of the mortgaged debt, and the proceedings are by accident or mistake incomplete in the respect that they leave an equity of redemption in a part of the premises in the heirs at law of one of the mortgagors, the plaintiff in such action, being the purchaser at the sale, or his grantee, may maintain an action to foreclose the unextinguished equity of redemption for the unpaid residue of the debt.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

J. W. Eller, C. G. McDonald and Benjamin S. Baker,
for appellants.

Charles Battelle, contra.

AMES, C.

James W. Eller and Frances E., his wife, were the owners in severalty each of an undivided half of certain lots and a dwelling house situated thereon, and were in joint occupancy of the same as a homestead. In May, 1892, they joined in the execution of a note and of a

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mortgage of the premises for the sum of \$5,000, and interest, to the Globe Loan & Trust Company of Omaha. In February, 1896, they also joined in a warranty deed, then or soon afterwards duly made of record, conveying the premises to Ida M. Dolan. In December, 1898, Mrs. Eller died, leaving surviving her certain minor children of the marriage, who, together with their father, continued to occupy the premises. Afterwards the Randolph Savings Bank, having become the owner of the note and mortgage by purchase and assignment, began an action of foreclosure to which James W. Eller and Mrs. Dolan, as the apparent owner of the equity of redemption or fee title, and her husband, were made parties. The Dolans made default, but Eller answered, alleging, among other things, that the deed to Mrs. Dolan was executed and delivered by way of mortgage to secure an indebtedness. The action proceeded to a decree of foreclosure, but the order of sale was stayed for the statutory period at the request of Eller. After the expiration of the stay a stipulation was entered into between the plaintiff and Eller, by which the latter was released and discharged from liability to a deficiency judgment, and was permitted to retain possession of the premises for the term of one year, without payment of rent, in consideration of his agreement not to resist a sale of the premises, or a confirmation thereof, under the decree. A sale was thereafter had and duly confirmed for \$4,667, leaving an unpaid residue of several hundred dollars of principal and interest, the plaintiff in foreclosure being the purchaser, to whom a sheriff's deed was issued.

The Randolph Savings Bank became insolvent and passed into the hands of a receiver, who sold the title acquired at the foreclosure sale to the plaintiff in this case, and executed and delivered to the latter a deed purporting to convey the premises to him. The note remained in the hands of the attorney, in the foreclosure suit, of the Randolph Savings Bank, and was delivered to the plaintiff McCague without further consideration.

Afterwards the plaintiff successfully prosecuted a suit in forcible detainer against Eller and obtained a writ of restitution against him. Eller then departed from the premises, but the children of Mrs. Eller, some of whom had attained to their majority, remained in possession of the premises claiming to be owners of an undivided half of the same as the heirs at law of their mother. It thus appears that the action of foreclosure was incomplete in the respect that the heirs at law of Mrs. Eller were not parties to, and their equity of redemption was not extinguished by, it. This is an action against the heirs to foreclose their equity of redemption in an undivided half of the premises for the unsatisfied portion of the mortgage debt. There was a decree for the plaintiff in the lower court, from which the defendants appeal.

So far as appears, the first actual notice that the Randolph Savings Bank, or its receiver, or the plaintiff had that the deed to Mrs. Dolan was intended as a mortgage only, or that the foreclosure was incomplete, was when the heirs set up their claim of ownership and right of possession, after Eller had personally vacated the premises in obedience to the writ of restitution issued in the forcible detainer suit. But, notwithstanding the purpose for which the Dolan deed was executed and delivered, it was effectual to convey the legal title to the premises. *Dodge v. Omaha & S. W. R. Co.*, 20 Neb. 276; *Stall v. Jones*, 47 Neb. 706; *Gallagher v. Giddings*, 33 Neb. 222. It follows, as a matter of course, that the foreclosure decree, sale and deed operated to convey the legal title to the purchaser at the judicial sale, leaving in the heirs of Mrs. Eller nothing more than an equity of redemption of an undivided half of the premises, and in James W. Eller nothing at all. It follows equally, of course, that the deed from the receiver, which it is not sought in any way to impeach, conveyed the entire title to the plaintiff, subject only to the equity of redemption in the heirs, which it is sought in this action to foreclose. We can see no room for doubt, upon principle or authority, that it

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also conveyed to the plaintiff the right to demand and obtain such redemption or to apply to a court of equity for its foreclosure. It is certain that no one else has that right. The effect of the transaction was to extinguish the mortgage by a merger of it in the legal title to the whole of the mortgaged premises, but a residue of the mortgage debt, for a payment of which the lands had been pledged, remains unsatisfied, and the equity of the heirs of Mrs. Eller to redeem an undivided half of the premises therefrom is still unextinguished. If this action had not been begun, and they had desired to enforce their right of redemption, against whom should their suit have been brought? Certainly against no one but the present plaintiff, in whom is vested the legal title which it would have been the sole object of such an action to recover. It would not be contended, we apprehend, that in such a case it would have been necessary for them to seek out the mortgagee, or his insolvent assignee, or the purchaser at the foreclosure sale, the rights, interests and titles of all of whom, as respects the realty, are united in the plaintiff. Nor can it be contended, we think, that the Randolph Savings Bank, or its representative, after having prosecuted the suit in foreclosure to a sale purporting to convey the entire title, both legal and equitable, and after having conveyed the premises by a deed of like purport through its receiver, would be heard to assert any claim on account of the unpaid residue of the mortgage debt, to the prejudice of its grantee, the plaintiff. It is evident beyond dispute that the incompleteness of the foreclosure is due to accident and misapprehension, and not to the intent of the plaintiff therein, and it cannot be doubted that if the latter had remained solvent and was prosecuting this action it would be entitled to the decree appealed from.

The right of redemption and the right to extinguish that right by judicial foreclosure are mutual and reciprocal, and we have no doubt that the plaintiff has become subrogated to the unpaid residue of the mortgage debt,

in so far as the same is requisite for the protection of his title, of which it is in equity one of the muniments. As is said in *Emmert v. Thompson*, 49 Minn. 386:

"It has been well said that the doctrine of subrogation has been steadily growing and expanding in importance, and becoming more general in its application to various subjects and classes of persons. It is not founded upon contract, but is the creation of equity, is enforced solely for accomplishing the ends of substantial justice; and, being administered upon equitable principles, it is only when an applicant has an equity to invoke, and where innocent persons will not be injured, that a court can interfere. It is a mode which equity adopts to compel the ultimate payment of a debt by one who in justice and good conscience ought to pay it, and is not dependent upon contract, privity, or strict suretyship." See also *Brobst v. Brock*, 77 U. S. 519; *Rogers v. Benton*, 39 Minn. 39; *Givins v. Carroll*, 40 S. Car. 413; *Jackson v. Bowen*, 7 Cow. (N. Y.) 13.

The judgment in this case is the ordinary decree of mortgage foreclosure and sale of the undivided half of the premises for the satisfaction of the unpaid residue of the mortgage debt. In our opinion it is right, and we recommend that it be affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

**ZACK THOSTESEN, APPELLEE, V. CHARLES W. DOXSEE ET AL,
APPELLANTS.**

FILED NOVEMBER 22, 1906. No. 14,469.

Statute of Frauds: LEASE. Under the provisions of section 5, ch. 32, Comp. St., as amended in 1903, an oral contract for the leasing of lands for a period of more than one year from the making thereof is void.

APPEAL from the district court for Custer county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

R. A. Moore, for appellants.

H. M. Sullivan, contra.

OLDHAM, C.

This was an action in forcible entry and detainer originally instituted in the county court of Custer county, Nebraska and taken by appeal to the district court for that county, where a jury was waived and the cause submitted to the court on the following agreed statement of facts: "It is stipulated between the parties that the defendants entered into a written lease with the plaintiff on or about the 1st day of March, 1904, whereby the plaintiff leased to the defendants for the term of one year from March 1, 1904, the land described in the lease; that for the pasture they were to pay him cash \$125 and for the land planted to small grain and corn they were to pay one-third; that sometime in December, 1904, the parties got together and it was orally agreed that the defendant, C. H. Doxsee, would not want the land for the year beginning March 1, 1905, but that the other defendant, C. W. Doxsee, would want it for the period of one year from the 1st of March, 1905, and it was orally agreed between the plaintiff and the defendant, Charles W. Doxsee, that he might remain on the place for the period of another year from

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March 1, 1905, on the same conditions as were specified in the original lease. It is further agreed that before the beginning of this action in the county court notice as required by law was served upon the defendants to quit, and that at that time neither of them had planted any crops, and that they were in possession of said premises under the old lease up to March 1, 1905. It is further stipulated that in said oral lease it was specified that the contract existing between them for the year up to March 1, 1905, should extend from March 1, 1905, to March 1, 1906, with all the conditions contained in said lease, without it being signed anew, and the only change that should be made to it was that C. H. Doxsee should be released from its operations. And it was never the intention of the parties to sign up or execute a new lease, but the terms of the old lease were the terms of the new oral contract between the plaintiff and Charles W. Doxsee, made in December, 1904."

It seems to us that the only legitimate conclusion to be drawn from this stipulation is that there was a written contract between plaintiff and the two defendants for the leasing of the premises from March 1, 1904, to March 1, 1905, on the terms stated in the stipulation; that during the month of December preceding the expiration of the written lease there was a conversation between the three parties to the contract, in which it was understood that C. H. Doxsee did not desire to occupy the premises beyond the term of the written lease, but that defendant Charles W. Doxsee desired to lease the premises on the terms contained in the written lease for the year beginning March 1, 1905, and ending March 1, 1906; and that the plaintiff agreed that he would make such an oral lease with the defendant Charles W. Doxsee; that this verbal contract was entered into three months before the beginning of the lease; that a little while before the time of the expiration of the written lease plaintiff rescinded his oral contract for the lease of the premises to Charles W. Doxsee, and served the statutory notice to quit the

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premises within three days after the expiration of the written lease; and that after defendants' failure so to do plaintiff immediately instituted this suit in forcible entry and detainer. The notice to quit was served before the defendant Charles W. Doxsee had either entered into possession under, or done any act in part performance of, the oral agreement for the lease. Section 5, ch. 32, Comp. St., provides as follows: "Every contract for the leasing for a longer period than one year from the making thereof, or for the sale of any lands, or any interest in lands shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made." To our minds the agreement between plaintiff and Charles W. Doxsee was nothing more than an oral contract for the leasing of lands for a period of more than one year from the making thereof, which is denounced as void by the provisions of the statute above quoted as it now stands as amended in 1903.

We therefore recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

NANCY E. CLINEBELL, APPELLEE, V. CHICAGO, BURLINGTON
& QUINCY RAILROAD COMPANY, APPELLANT.*

FILED NOVEMBER 22, 1906. No. 14,484.

1. **Railroads: LIABILITY.** A railroad company is not liable for injuries caused by a team taking fright at the ordinary operation of a train upon its road. *Hendricks v. Fremont, E. & M. V. R. Co.*, 67 Neb. 120, followed and approved.

* Rehearing denied. See opinion, p. 542, *post*.

2. Evidence examined, and held insufficient to sustain the judgment of the trial court.

APPEAL from the district court for Custer county:
BRUNO O. HOSTETLER, JUDGE. *Reversed.*

J. W. Deweese and F. E. Bishop, for appellant.

N. T. Gadd, R. G. Moore and J. H. Broady, contra.

OLDHAM, C.

This is an action for personal injuries, and is here for a second review by this court. At the first hearing a judgment in favor of the plaintiff was reversed because plaintiff's petition failed to allege any negligent act on the part of the defendant which was the proximate cause of the injuries. The opinion is reported in 5 Neb. (Unof.) 603. After the reversal of the judgment an amended petition was filed and issues joined, and on a trial to the court and jury plaintiff again secured a verdict and judgment, from which defendant appeals.

The only alleged error called to our attention in the brief of the appellant, which it will be necessary to consider, is as to the sufficiency of the testimony to support the judgment. There is no serious dispute as to the manner in which plaintiff's injuries were received. It appears that she was driving home with a gentle team in an open top buggy along a highway, which for some distance near the place of the accident runs nearly parallel to defendant's right of way. The general direction of the public highway is east and west, and the defendant's right of way crosses it at the place of the accident, running in a southeasterly direction. West of the crossing there is a cut about 300 feet long and about 7 feet deep. At the crossing the railroad embankment is about 12 feet high, with an approach leveled back about 37 feet, by which the wagon road crosses the track at right angles. Before reaching this approach the road follows a depression or

gully north of the railroad and comes up an incline to the level of the embankment. Just as plaintiff had driven to the top of the incline to turn in on the approach to the crossing, a freight train came out from the mouth of the cut, and probably caused plaintiff's team to shy and frighten plaintiff so that she jumped or fell from the buggy and received the injuries complained of.

Plaintiff's account of the accident is rather incoherent, probably because she was dazed from fright, as appears from the following extract from the record: "Q. State to the jury what happened. A. Well, I was driving along and I was careful. I was careful and looking. I didn't think of the train or nothing coming for I couldn't see. It was my view right towards home to see a train, but I didn't see any. I supposed maybe it had gone down. I didn't know and I drove along there, didn't hear any sound or nothing, and I drove up on the crossing, pretty near to the crossing, and the first thing I knew the horses threw their ears up, pricked their ears up, and that's all I know. I don't know how I got out or nothing. * * * Q. What happened afterwards, if you know? Where did you go? A. Well, when I come to myself the train was done gone, I discovered. I got up the best I can, I don't know how, but I was frightened, when I got up I saw my fingers was cut here and here (indicating), and I hobbled up and I discovered the box was loose from the buggy, and I didn't know what to do, anyway. I don't know how I got around, but I got around some way; and when I went to get the horses around and went to fastening up the tugs I was all this nervous. I didn't see any hurt, but I was bloody here, and I was just so nervous I couldn't fasten the tugs at all, but I got them fastened and I discovered the footsteps to get into the buggy, and I just threw my foot up on them, and I got into the buggy, and the team started off with me. When I got on the track everything was turned blind. I was turned blind. I couldn't see. I squatted right down in the buggy, and the team took me home. That is all I know about that."

She also testified that she did not hear either the bell or the whistle before seeing the train. It was further established that when she got home she was in a dazed, partially unconscious condition, and bore evidence of severe and painful injuries from her fall. Numerous witnesses, at various distances ranging from a quarter to a half a mile from the railroad, testified that they heard neither the bell nor the whistle when the train passed the crossing. The only witnesses, other than the plaintiff, who saw the accident were two brakemen on defendant's train. The brakeman near the front end of the train testified that he saw the horses turn slightly away from the track when the train approached, and saw plaintiff jump from the buggy. The brakeman who was on the caboose testified that, when his car passed the team, plaintiff was standing by the horses and apparently holding them. All the employees in charge of defendant's train testify positively that the whistle was sounded at the whistling post 200 feet west of the crossing, and that the bell was rung continuously while passing through the cut and over the highway.

The only negligent act relied upon by plaintiff as the proximate cause of the injury was the defendant's failure to ring the bell and blow the whistle on approaching the crossing, it being contended that if these signals had been given plaintiff would have heard them and would have remained down in the gully until the train had passed, and would thus have escaped the accident. While the failure to give these signals on approaching a public crossing constitutes statutory negligence, yet, unless such negligence is shown to be the proximate cause of the injuries complained of, proof of this fact alone is not sufficient to show a right of recovery. Even though we were willing to concede that the negative testimony of plaintiff's witnesses, as against the positive declarations of the persons in charge of the train, is sufficient to sustain the finding of the jury that the statutory signals were not given at the crossing, we are still unable to see how,

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without entering on the domain of remote speculation, we could conclude that such failure was the proximate cause of plaintiff's injury. The contention that plaintiff would not have driven up onto the approach of the crossing if she had heard the statutory signals is purely conjectural and unsupported by any testimony contained in the record. To our minds, the only logical conclusion that can be deduced from the facts surrounding the accident is that the proximate cause of the injury was the fright either of plaintiff or her team at the ordinary operation of a passing train. In the recent case of *Hendricks v. Fremont, E. & M. V. R. Co.*, 67 Neb. 120, it was held that "a railroad company is not liable for injuries caused by a team taking fright at the ordinary operation of a train upon its road."

We therefore conclude that the evidence is insufficient to sustain the judgment, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

The following opinion on motion for rehearing was filed April 4, 1907. *Rehearing denied:*

OLDHAM, C.

Counsel for plaintiff below have filed a very clear, concise, and well-directed brief in support of a motion for a rehearing in this case, in which they ask us to set out more specifically our views on the liability of a railroad company for injury occasioned at or near a public crossing, where the failure to comply with the statutory requirements of ringing the bell and blowing the whistle is estab-

lished. In compliance with this request we would say that it is always a violation of the statute to neglect to give these signals at the distances from public crossings therein prescribed, and such failure subjects the railroad company to the penalties prescribed, whether injuries occur from such cause or not. But, where the failure to give these signals is relied on as actionable negligence in seeking to recover for injuries received at or near the crossing, such failure must be shown by competent testimony to have been the proximate cause of the injuries complained of, that is, it must stand in relation to the injuries as cause to effect. Now, in the case at bar, there is no dispute as to how the injury was received. The plaintiff was in her buggy on the public road, about 30 feet from the railroad track, when the freight train came along. She probably became frightened at the train, and jumped from the buggy and was hurt. The team did not run away and cause the injury, but remained standing while the train passed, and until the plaintiff had hitched up the loose tug and replaced the fallen tongue in the neck-yoke, when she drove home. We think there can be no question that the proximate cause of this injury was plaintiff's fright at a moving train operated in an ordinary manner. There can be no doubt, under the testimony, that if she had remained in the buggy no injury would have befallen her. Consequently, her misfortune falls within the large class of regrettable casualties for which no one is legally to blame. We therefore recommend that the rehearing be denied and the former opinion adhered to.

AMES and EPPERSON, CC., concur.

By the Court: Motion overruled. .

JAMES MERRIMAN, APPELLANT, V. GRAND LODGE DEGREE
OF HONOR, ANCIENT ORDER OF UNITED WORKMEN OF
NEBRASKA, APPELLEE.

FILED NOVEMBER 22, 1906. No. 14,497.

1. **Insurance: APPLICATION.** Where a married woman is the holder of a policy of life insurance, it is not a false representation for her to sign a certificate, when she is pregnant, stating that she is in sound bodily health, if the certificate is otherwise true.
2. ———: ———. Where a married woman is an applicant for life insurance in a company that issues policies on the lives of married women, she is not required to inform the company of evidence of pregnancy discovered subsequently to her physical examination and application.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed.*

T. J. Doyle, for appellant.

A. G. Greenlee, contra.

OLDHAM, C.

This was an action on a fraternal benefit certificate issued by the defendant to Katherine Merriman, deceased, payable at her death to her husband, plaintiff in this action. The death of Katherine Merriman, her initiation into the order, the issuance of the certificate, and the payment by the deceased of all dues and assessments in conformity with the by-laws of the order and the provisions of the policy are all admitted. The sole defense relied on is that the deceased made false representations in her application for the benefit certificate in the order, it being alleged that she falsely represented that she had not had paralysis prior to making her application for membership, and that she had falsely represented that she was not pregnant at the time of such application. Defendant's testimony was all directed to the support of these two

alleged false representations. On a trial of these issues to the court and jury, there was a verdict and judgment for the defendant, and the plaintiff appeals to this court.

For an intelligent review of the assignment of error in the plaintiff's brief, which, we think, is worthy of serious consideration, it is essential to review the admitted as well as the disputed questions at issue in this case. The defendant society, the Degree of Honor of the Ancient Order of United Workmen of Nebraska, is primarily a social organization for women bearing certain relationship to the members of the Ancient Order of United Workmen. Any woman bearing the required degree of relationship to a member of the parent order is eligible to social membership in defendant's order, but there is also within the order a benefit department for the purpose of providing life insurance for those of the members who may be found to come within the requirements as to age and health. On the 11th day of September, 1902, Katherine Merriman made application for membership in the Mistletoe lodge, No. 104, of Lincoln, Nebraska, a subordinate lodge of the defendant order, and, on the 18th day of October she signed an application for membership in the benefit department and submitted to a physical examination by the examining physician of the department under the rules of the order. This application could not be acted upon until the applicant had been initiated into the order, and on November 27 following she presented herself and was initiated. After her initiation, her application and the report of the examining physician thereon and the certificate of membership were presented to the grand medical examiner of the order and approved, and forwarded to the Grand Recorder, and on the 17th day of December the benefit certificate sued on was issued and sent to the deceased. Between the time of making application and the time of final issuance of the certificate there had been a lapse in payment of dues and assessments, which required, under the rules of the order,

Merriman v. Grand Lodge Degree of Honor.

a certificate of health before the back dues could be received and the benefit certificate be made effective. The before the policy was issued: "I, Katherine Merriman, lowing health certificate, which she signed and returned before the policy was issued: "I, Katherine Merriman, a member of Mistletoe lodge, No. 104, located at Lincoln, in the state of Nebraska, to whom benefit certificate No. — was issued in the beneficial department of the Grand Lodge Degree of Honor, A. O. U. W. of Nebraska, having been suspended from all the rights, benefits and privileges of the said department, by reason of nonpayment of assessment No. —, which suspension and forfeiture occurred within a period of three months prior to the date of this certificate, and desiring to be reinstated in said department as provided by the laws thereof, do hereby certify and warrant that I am, at this date, in sound bodily health, and that I agree that the reinstatement of myself as a member of the department based upon this certificate shall be valid and binding only upon the condition that the statement herein contained, relating to my bodily health, is true in every respect upon the day and date recorded on this certificate. (Signed) Katherine Merriman."

In the application for membership there are two lists of questions or interrogatories, one list to be answered by the applicant, and the other to be answered by the examining physician from his personal examination of the applicant. Among the questions propounded to and answered by the applicant was the interrogatory, "Have you ever had paralysis?" This question appears from the application to have been answered, "No." Among the questions which the examining physician was required to answer, when the applicant was a married woman, is, "Is she now pregnant?" The physician answered this question, "No." Now, it is without dispute in the record that plaintiff's wife died on the 10th day of April, 1903, from placenta prævia, or hemorrhage in childbirth. There was evidence

in the record, offered by the defendant, tending to show that the deceased had suffered from a partial stroke of paralysis about 18 months before making her application for membership in the order, but, on the other hand, it was contended by plaintiff that her ailment at that time was of a temporary character, a mere prelude to childbirth, and a symptom caused by pregnancy and of temporary duration, and plaintiff introduced testimony strongly tending to show that after the applicant's confinement she recovered her normal robust health, and engaged in hard labor, and was, at least apparently, in excellent physical condition until the day before her death.

As there is little or no competent testimony in the record pointing to paralysis as a contributing cause of Katherine Merriman's death, it is highly probable that the jury returned a verdict for defendant on the theory that the applicant had fraudulently concealed her condition of pregnancy from defendant's examining physician. While the examining physician testified that he made a careful physical examination of deceased, yet he said that he saw no outward signs of pregnancy and relied on deceased's statement that she was not in that condition. He also testified that from his examination he believed her to be a first-class risk for insurance. Now, from the fact that a fully developed child was born to the deceased about six months after the examination, it is clearly established that she was about three months pregnant when the examination was made, so that the material question is whether or not she fraudulently and knowingly misrepresented her condition. The testimony of the medical experts in this case shows that before the quickening period pregnancy cannot be detected from general symptoms, and that the quickening period ordinarily occurs during the fourth or fifth month of pregnancy. Consequently, the evidence is very slight that tends to show that the deceased knew of her pregnancy on the 18th day of October, 1902, but it is much stronger on the probability of her having knowledge of such fact on the 1st

of December following, for that date was probably, under the testimony, within the quickening period.

At the trial of the cause plaintiff asked for an instruction which, in substance, confined the applicant's knowledge of the truth of her answers to the question to the time when the application was signed. The court refused to give this instruction, and told the jury in paragraph 3 of instruction on its own motion: "In considering the question whether any statement made by the deceased, Katherine Merriman, was true or false, you should consider it as of the time she signed the application, up to and including the time when the contract between her and the defendant company was completed, being the time of the final approval of the application by the company, to wit, December 17, 1902. This is true, for the reason that up to the time of the final approval of the application it would be her duty to correct any statement contained in her application made by her which she subsequently learned was false." The learned trial court evidently gave this instruction on the theory that the health certificate signed on the 1st day of December amounted to a reaffirmation of each of the answers to the questions contained in the original application. To our minds this would extend the scope of the certificate much beyond what might reasonably have been within the mind of the party signing it. *American Order of Protection v. Stanley*, 5 Neb. (Unof.) 132, and *Geare v. United States Life Ins. Co.*, 66 Minn. 91. This certificate should be construed so as to resolve all doubts and ambiguities contained in it, if any there be, in favor of the insured or her beneficiary, and, so construed, it simply warrants that the applicant was in sound bodily health at the time she signed it. It will not do, in sound morals, for an insurance company to issue risks on the lives of married women between the ages of 18 and 45 years, without anticipating the probability of the holders of such policies obeying the divine mandate to be fruitful and multiply and replenish the earth, and a condition, either in the by-laws,

articles of association, or certificate of benefit, providing for a forfeiture in the event that the holder should become pregnant at any time would be clearly void as against the highest principles of religion, morality, and common decency. Consequently, when an application is made and approved, there is no duty on the holder of the certificate issued on such application to notify the company of any subsequently discovered evidence of pregnancy, nor would the fact, if subsequently discovered, prevent her from certifying that she was in sound bodily health, if such certificate is otherwise true. The only representation here is as to her apparent state of health, and all the evidence in the record shows that at that time she was, to all appearances, a robust and healthy woman. We are therefore impressed with the opinion that the learned trial judge erred in refusing the instruction asked by the plaintiff, as well as in giving the third paragraph of instructions above set out, for under this instruction the jury might have found the evidence insufficient to carry knowledge of pregnancy to the deceased when she made application on October 18, and still sufficient to apprise her of such fact two months later, December 17, when the certificate was issued.

We therefore recommend that the judgment of the district court be reversed and the cause be remanded for further proceedings.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

JAMES SEGEAR, APPELLEE, v. GEORGE WESTCOTT, APPELLANT.

FILED NOVEMBER 22, 1906. No. 14,502.

Landlord and Tenant. The owner of land, in the possession of a tenant whose lease provides that the lessor may sell or dispose of any part thereof by making a corresponding reduction in the rent, may, without the consent of the lessee, dedicate a part thereof to the public for a highway.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JR., JUDGE. *Reversed.*

W. C. Lambert, for appellant.

J. W. Eller, contra.

EPPERSON, C.

July 5, 1900, defendant agreed verbally to pay plaintiff \$25 a month for the privilege of hauling garbage over a tract of land of which plaintiff was lessee. Defendant paid the stipulated amount until August 5, 1901, and plaintiff brings this action to recover for 22 months thereafter. Defendant admits the making of the contract, and alleges that from and after August 5, 1901, he used a public highway which the authorities of South Omaha had established over plaintiff's leased property. Plaintiff denies that the highway was established, and on this issue alone the rights of the parties depend. The facts relied on by defendant to prove the establishment of the street are substantially as follows: In June, 1901, the president of the United Real Estate and Trust Company, which was the owner of the land in controversy and plaintiff's lessor, made a written proposition to the mayor and council of South Omaha, agreeing to cause the strip of land here in controversy to be dedicated to the public as a highway in consideration of \$100, payable to his company, and a further consideration that the city would

make certain specified improvements. Pursuant to this proposition the city council issued its warrant to the real estate company and proceeded with the improvement of the road substantially as specified in the proposition of the company. Afterwards the road was used generally by the public, the plaintiff herein, however, at all times maintaining that the public had no rights therein. The warrant payable to the real estate company was not called for, nor was it delivered, until after this suit was instituted, when it was delivered to the company and accepted. At no time did the company object to the establishment of the street. In the district court the jury returned a directed verdict for the plaintiff, and the defendant appeals.

The only theory upon which the plaintiff can recover is that the alleged street was established without the payment of damages to him and to the prejudice of his rights under the lease. The evidence did not disclose the contents of the lease. Defendant filed a motion for a new trial on account of newly discovered evidence, alleging that since the trial he had discovered that the plaintiff's lease reserved to the lessor the right to sell or dispose of the said tract of land, or any portion thereof, and that in the event of the disposition of a part the lessor was to refund a proportionate amount of the rent. A sufficient showing of diligence was made by defendant. He shows that he did not know the nature of the lease; that at the time of the trial the officers of the lessor, who were in possession of the lease, were not within the jurisdiction of the court; that he had no reason to believe it contained such a provision, and, further, that plaintiff had previously told defendant, and at the trial in the county court testified, that no person had a right to acquire interests in said property without plaintiff's consent. The newly discovered evidence, if as alleged, will show that plaintiff had no interest in the land which would prevent his lessor from disposing of the tract in controversy by a dedication thereof to the city for street purposes, and in such an event the plaintiff herein cannot complain

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that the street was irregularly established. Ordinarily a landlord cannot dedicate any part of the property leased without the consent of the tenant. Where, however, the lease expressly provides that the landlord may dispose of a part of the land, with a corresponding reduction in the rental, such clause should be taken as a limitation of the lessee's estate and binding upon him.

The court erred in refusing the defendant a new trial, and we recommend that the judgment be reversed and the cause remanded for a new trial.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

ALBERT BAHR, APPELLEE, v. CARL MANKE, APPELLANT.

FILED NOVEMBER 22, 1906. No. 14,517.

Contract: BREACH: DAMAGES. To entitle one to recover in an action in damages for the breach of a contract, he must show that the wrong done and the injury sustained bear toward each other the relation of cause and effect. The damages which one has sustained to entitle him to recover must be the natural and proximate consequence of the wrongful act complained of.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Reversed.*

Billingsley & Greene and Berge, Morning & Ledwith,
for appellant.

George A. Adams, contra.

EPPERSON, C.

The parties hereto are brothers-in-law. That part of their differences out of which this litigation grew may

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be stated as follows: In 1894, plaintiff purchased 160 acres of land, paying therefor in cash \$1,400 and assuming a mortgage held by one Hartwick for \$1,800 due August 3, 1897. At the time of the purchase plaintiff gave defendant a mortgage on the land purporting to secure a loan of \$2,400 due March 1, 1899. Plaintiff alleges that the consideration for this note was an advance to him by defendant of \$600 as a loan and the promise of defendant to pay the Hartwick mortgage of \$1,800. Defendant contends that he advanced to plaintiff the full sum of \$2,400. These facts were in issue and determined in a foreclosure suit instituted by Hartwick against the parties hereto in Seward county. In that action defendant herein by cross-petition sought to recover the full amount of his \$2,400 mortgage. The matter was adjudged against him, and he was permitted to recover only the \$600 and interest. The foreclosure suit was instituted in 1899. The decree of foreclosure was entered in January, 1900, and the land ordered sold to satisfy \$2,126 due Hartwick and \$647 due defendant. Plaintiff herein stayed an order of sale one year. April 16, 1901, the land was sold under the decree to the defendant herein for \$2,805. From an order confirming the sale plaintiff herein appealed to this court, where the order of confirmation was affirmed, and a mandate issued March 4, 1903. See *Hartwick v. Woods*, 4 Neb. (Unof.) 103.

Plaintiff brings this action to recover damages, alleging that the conduct of defendant in failing to pay the Hartwick mortgage and attempting to collect the full amount of his own mortgage was wrongful, and that he was damaged because such conduct prevented him from borrowing money with which to redeem from the lawful incumbrance. In the court below plaintiff recovered judgment for \$1,987.37, and the defendant appeals.

There is no contention by plaintiff that defendant contemplated fraud at the inception of the agreement. When the \$2,400 mortgage was given to defendant, \$1,800, which was intended to redeem from the Hartwick mortgage, was

left with one Hagensick, who never used it for the purpose intended, nor did he repay it. Each party contends that Hagensick was the agent of the other. This question we consider was finally determined adversely to defendant herein in the foreclosure case above referred to. There is no evidence showing an obligation of defendant to pay the principal of the Hartwick mortgage before its maturity. It must therefore be considered that the defendant herein, upon the maturity of the Hartwick mortgage, broke his contract with plaintiff, and wrongfully maintained from that time until the decree of foreclosure was rendered that he held a mortgage for \$2,400 instead of one for \$600. This is the extent of the defendant's wrong. It will be observed that the foreclosure suit was not instituted until after the maturity of the defendant's mortgage. Plaintiff knew as early as February, 1898, that defendant had not paid the Hartwick mortgage and of his intentions not to do so. He then attempted to borrow money with which to pay all the incumbrances, and testifies that Hartwick promised to let him have the money, but changed his mind upon hearing that defendant claimed to have a mortgage for \$2,400. Plaintiff at that time had a remedy which would have afforded speedy relief. He should have instituted an action to clear the title of his land from the cloud of the \$2,400 mortgage, or an action to require the defendant to pay the Hartwick mortgage. Thereby the interests of the parties would have been established, and the amount of his liability fixed, and the title would have been such that a loan could have been procured. No greater relief, however, could have been granted in such action than was granted later in the foreclosure suit. In either event the courts were open to him. He awaited the institution of the foreclosure suit to have the matter adjusted. Had the defendant herein paid the Hartwick mortgage, as he agreed, he would have been entitled to foreclose his mortgage for the full amount, and on the date of the decree plaintiff would have owed no less than under the existing circumstances he owed on both mort-

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gages. There is no evidence that plaintiff had no money with which he could have paid his indebtedness. There was standing against his land an incumbrance of \$2,400, which he admitted owing, with interest. He has never been required to pay a greater sum.

Plaintiff testified that during the pendency of the foreclosure suit he attempted to borrow the amount necessary to redeem. Even were we to presume that the plaintiff did all in his power after the decree of foreclosure to procure funds to redeem by mortgaging his land, and that he failed on account of the security being insufficient, the fact still would remain that the amount of the decree was a legitimate indebtedness which would have existed had the defendant never broken his contract. It is elementary that the wrong done and the injury sustained must bear toward each other the relation of cause and effect. The damages which one has sustained to entitle him to recover must be the natural and proximate consequence of the wrongful act complained of. *Fitzgerald v. Fitzgerald Construction Co.*, 44 Neb. 463; *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210. After the decree of foreclosure, and before sale, it was plaintiff's privilege to exhaust his resources in attempting to redeem. Courts will consider that money is always in the market and may be had upon real estate security at a reasonable rate of interest. It is apparent in this case that the loss of plaintiff's farm by foreclosure was but the sequence of his failure to pay his legal obligation, and not the result of defendant's wrongful conduct.

We recommend that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

WILLIAM A. GORDON V. CITY OF OMAHA.**FILED NOVEMBER 22, 1906. No. 14,311.**

1. **Attorney and Client.** An attorney may, by virtue of his retainer, receive and receipt for money due his client in a case in which he is employed, and the act will bind his client, unless the party paying it had notice of a revocation of the attorney's authority to act in the case.
2. **Cities: NOTICE.** Notice affecting a city must, under section 7453, Ann. St., be in writing and be served on the mayor, or acting mayor, or, in the absence of both from the city, upon the city clerk.
3. **Petition: OBJECTIONS TO EVIDENCE.** An objection to the admission of evidence on the ground that the petition does not state facts sufficient to constitute a cause of action may be taken at any time during the progress of the trial, and is not waived by answer or failure to demur. Where the objection is sustained, and the plaintiff elects to stand on his petition, or does not take leave to amend the same, judgment should be entered for the defendant.
4. **Officers: ASSIGNMENT OF SALARY.** Whether a city officer may bind the city by assigning his salary prior to the issue of a warrant therefor not discussed or determined.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

L. D. Holmes, for plaintiff in error.

Harry E. Burnam and I. J. Dunn, contra.

DUFFIE, C.

By the judgment of the district court for Douglas county entered July 5, 1902, Frank E. Moores, mayor of the city of Omaha, was directed to sign a certain warrant, No. 53,327, for the sum of \$1,600, payable to Samuel I. Gordon, and drawn by the comptroller of the city in part payment of the salary of said Gordon as police judge of the city of Omaha for the year 1901. The judgment of the district court was, on appeal taken by the mayor, affirmed by this court, and the warrant thereafter duly executed.

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J. W. Eller represented Judge Gordon as his attorney in that case, and on or about April 14, 1903, the warrant was delivered to Eller, who receipted the same as attorney for Gordon and who obtained the money thereon from the city treasurer. These facts are alleged in the petition filed in this case, and it is further alleged that on January 24, 1903, the said Samuel I. Gordon sold and assigned to the plaintiff all his right, title and interest in and to the sum of \$2,500, due to him for salary as police judge of the city of Omaha for the year 1901, to be held by him as security for the payment of certain debts of the said Samuel I. Gordon, an itemized statement of which is set forth in the petition. It is further alleged that, before Eller presented the warrant for payment, plaintiff notified Eller of the assignment to him, and that he also notified the city treasurer that the said salary due to Judge Gordon, and which was in part evidenced by said warrant No. 53,327, had been sold and assigned to the plaintiff, who was the only party entitled to receive payment thereon. Judgment is prayed against the city for the amount of said warrant with interest. The answer alleges Eller's employment as attorney for Judge Gordon in the mandamus proceeding brought to require the mayor to sign and deliver the warrant, and in numerous other cases in which Gordon was a party, and that there was due him as fees for services rendered said Gordon in his various suits a sum largely in excess of the amount of the warrant; that it was agreed between Judge Gordon and Eller that the latter should hold and collect the warrant and apply the same upon fees due him for legal services. It is also alleged in the answer that Eller was the attorney of record for Judge Gordon in the district and supreme courts in the case involving the issue of said warrant, and so remained until April 27, 1904, and that as such attorney he was authorized to receive and receipt for the same. The reply denies that Eller remained the attorney of said Gordon or had any power to receipt for said warrant, and alleges the assign-

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ment to him at a date long previous to the payment of the same to Eller. It reiterates the allegation of the petition that the city treasurer had notice that the warrant and the debt had been assigned to the plaintiff before the same was presented for payment by Eller, and it denies any indebtedness from Judge Gordon to Eller on account of legal services. The record discloses that a jury was impaneled and sworn, and that the evidence was in part adduced, when defendant objected to any further evidence being admitted, on the ground that the petition did not state a cause of action. The district court sustained this objection and, on motion duly made, directed the jury to return a verdict for the defendant, which was accordingly done. The motion for a new trial was overruled, and judgment entered upon the verdict that the city of Omaha go hence without day, and have and recover from the plaintiff its costs.

If Eller, as attorney for Judge Gordon, had no authority to receive and receipt for the warrant in question, and to obtain the money thereon, then it is evident that some one is still indebted to the legal owner of the warrant for the amount thereof. Section 3606, Ann. St., provides, among other matters, that an attorney has power "to receive money, claimed by his client in an action or proceeding, during the pendency thereof or afterwards, unless he has been previously discharged by his client, and upon payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment." This statute is merely declaratory of the common law. The authorities are numerous and uniform that an attorney, by virtue of his retainer, may receive his client's money in a case in which he is employed, and the act will bind his client, unless the party paying it had notice of a revocation of the attorney's authority to act in the case. *Ruckman v. Alwood*, 44 Ill. 183; *McGill v. McGill*, 59 Ky. 258; *State v. Hawkins*, 28 Mo. 366; *Yockum v. Tilden*, 3 W. Va. 167, 100 Am. Dec. 738. It is admitted that Eller was attorney of record for Judge

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Gordon, and, under our statute and the decisions above referred to, he had authority to receive this warrant and collect the money thereon, unless previously discharged by Gordon and notice thereof brought home to the city. Judgment having gone in favor of the city on a demurrer *ore tenus* interposed to the petition, we must assume the truth of the allegation that notice of the assignment of this warrant to the plaintiff was given to the city treasurer before its payment. An assignment of a judgment is a revocation of the authority of the plaintiff's attorney to receive and receipt for the money due thereon, or to in any wise control the judgment. If the plaintiff in a judgment has parted with his right to control it by assigning it to a third party, it cannot be questioned that the power of his attorney ceased with such assignment, and that all parties in interest having notice thereon deal with the attorney thereafter in relation to the judgment at their peril. *Trumbull v. Nicholson*, 27 Ill. 149. This requires us to determine whether notice to the city treasurer of the assignment of the warrant, or rather the salary represented by the warrant, was notice to the city, no plea of any other notice being alleged in the petition, or of any facts from which notice might be inferred, such as an assignment on the record, or an entry or notice of record of Eller's discharge as attorney in the case. One of the provisions of the Omaha charter is in the following language: "The corporate name of each city organized under or governed by this act, shall be 'The City of ——' and all or every process or notice whatever, affecting any such city, shall be served upon the mayor, or acting mayor, or in the absence of both of said officers from the city, then upon the city clerk." Ann. St., sec. 7453. This statute undoubtedly contemplates a written notice, and it certainly requires notice to the executive head of the city, or, in his absence, to the clerk. No notice of the kind required by statute is pleaded, and we cannot judicially change or amend the statute by holding that notice to any other officer than the one mentioned in the statute

is sufficient. We conclude, therefore, that the allegations of the petition, if established, would not entitle the plaintiff to a judgment.

Complaint is made, as we understand from the appellant's brief, that the court directed a verdict and entered judgment thereon instead of dismissing the jury and the plaintiff's action. This requires us to consider what order should be entered on sustaining a demurrer *ore tenus* to the plaintiff's petition. The rule is well established that an objection to the admission of any evidence on the ground that the petition fails to state a cause of action may be taken at any time during the progress of the trial, and is not waived by answer or failure to demur. *Curtis & Co. v. Cutler*, 7 Neb. 315; *Ball v. LaClair*, 17 Neb. 39. This is undoubtedly the correct practice under our code. Section 94 of the code specifies the grounds upon which a demurrer to a petition may be interposed. Section 96 is as follows: "When any of the defects enumerated in section ninety-four do not appear upon the face of the petition, the objection may be taken by answer, and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action." In *Marriott v. Clise*, 12 Colo. 561, 21 Pac. 909, the supreme court of Colorado, under a similar statute, sustained the district court in allowing a demurrer to the plaintiff's petition on the ground that it did not state facts sufficient to constitute a cause of action after trial and verdict, and the authorities are quite uniform that the objection to the petition upon this ground may be raised at any time. *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Coffin v. Reynolds*, 37 N. Y. 640. The effect of such an objection to the petition is not greater nor different from sustaining a demurrer filed before answer.

Upon sustaining a demurrer to the petition, if the plaintiff elects to stand thereon, or if he does not take

leave to amend, final judgment in the case is entered against him. This is the practice under the Ohio code which we have adopted. *Devoss v. Gray*, 22 Ohio St. 159; Wild, Journal Entries (3d ed.), p. 29. While the usual practice may be to discharge the jury and dismiss the plaintiff's action upon sustaining a demurrer *ore tenus* to the petition, the fact that the court directed a verdict and entered judgment thereon is not material, and cannot be held reversible error. The authorities are numerous to the effect that, while a judgment on demurrer is a sufficient bar to a second action between the same parties on a cause involving the same facts, it is not a bar where the petition in the second action sets out material facts which were not passed upon in the first action. *Keater & Skinner v. Hock, Musser & Co.*, 16 Ia. 23; 1 Freeman, Judgments (4th ed.), sec. 267; 2 Black, Judgments (2d ed.), sec. 707; *State v. Cornell*, 52 Neb. 25. It is true that the journal entry made in this case shows a judgment entered on the verdict of a jury, but the whole record taken together shows that there was no trial on the merits, and the whole record when produced, should the judgment be pleaded in bar of another action based upon a sufficient petition, will have no further force or efficacy as a bar than a judgment entered for the defendant upon a demurrer interposed to the plaintiff's petition before answer filed.

We have discussed the case upon the theory that a city officer may bind the city by the assignment of his salary prior to the issue of a warrant therefor. We do not wish to be understood as having examined this question or to have expressed any opinion thereon. We prefer to leave it open for further consideration, it not being necessary to a determination of the case. Finding no reversible error in the record, we recommend an affirmance of the judgment.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

WILL CAPROON, APPELLEE, v. HAYDEN W. MITCHELL,
APPELLANT.

FILED NOVEMBER 22, 1906. No. 14,494.

1. **Appeal: REVIEW.** An order overruling a motion to strike from a petition will not be reviewed on appeal when not assigned as error in the motion for a new trial.
2. **Sales: RECOVERY OF PAYMENT.** The plaintiff purchased a horse from the defendant, giving his note for the purchase price. The horse was lost to the plaintiff on account of a chattel mortgage made prior to his purchase, and his note had been transferred before due to a good-faith purchaser. *Held*, That he might recover from the defendant the amount of his note and interest.

APPEAL from the district court for Antelope county:
JOHN F. BOYD, JUDGE. *Affirmed.*

E. D. Kilbourn, for appellant.

O. A. Williams, *contra*.

DUFFIE, C.

In an action commenced in county court, Caproon alleged that the defendant sold and delivered to him a horse for the sum of \$45, then duly paid by a promissory note for that amount; that the horse at the time of the sale was mortgaged to the Edwards-Bradford Lumber Company, who thereafter took possession from the plaintiff, and that the horse was wholly lost to him. A trial resulted in favor of the plaintiff, and defendant appealed to the district court. The plaintiff's petition in the district court was the same practically as that filed in the county court, except that it contained the additional averment that the note which plaintiff had given to defendant on the purchase of the horse "had been sold and transferred by the defendant before maturity for a valuable consideration, to the Clearwater State Bank." In the district court a motion was made to strike from the peti-

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tion this additional averment, for the reason that it presented an issue not raised or tried in the county court. The motion to strike was overruled, and this ruling is alleged as error. An examination of the motion for a new trial discloses that the ruling of the court on this motion was not alleged as error or urged as a reason why a new trial should be granted. We cannot, therefore, consider this assignment. *Barker v. Davies*, 47 Neb. 78. The evidence taken upon the trial has not been preserved in a bill of exceptions, and we have nothing before us but the pleadings and the judgment entered. We can, therefore, only determine whether the judgment is supported by the pleadings. If the defendant was still in possession of the note given him on the purchase of the horse, the plaintiff would have a perfect defense thereto, but it was sold before maturity to a good-faith purchaser. As against this purchaser the plaintiff has no defense. He has, therefore, been damaged to the amount of his note and interest by the horse being taken from him on a prior valid claim. We discover no error in the record, and recommend an affirmance of the judgment.

JACKSON, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MARGARET BATTLES, APPELLANT, V. HAGERMAN TYSON,
APPELLEE.

FILED NOVEMBER 22, 1906. No. 14,500.

1. Slander: QUESTION FOR JURY. Unless words upon which a charge of slander is based are plain and unambiguous in their meaning, the meaning intended by the defendant and the understanding of those hearing him should be left for the jury to determine.

2. ———. To charge a woman with being a lewd character, of using her body for commercial purposes, and with keeping a gambling room is actionable *per se*.

APPEAL from the district court for Fillmore county:
LESLIE G. HURD, JUDGE. *Reversed*.

F. B. Donisthorpe, for appellant.

Curtis & Waring, *contra*.

DUFFIE, C.

The petition in this case alleges that the defendant, on or about August 21, 1904, in a conversation had with divers persons, falsely and maliciously spoke and published the following false and defamatory words of and concerning her: "I want it understood that I am not running a gambling house, and that if a girl could not have decent company she has no business to have company at all; that she had three men in her room with her." It is further alleged that in the presence and hearing of others the plaintiff falsely and maliciously did speak and publish the following false and defamatory words of and concerning the plaintiff: "She was locked up in her room with three men in my house, and after they had gone I found an empty whiskey bottle on her table." It is further alleged by way of innuendo that the defendant, in so speaking of the plaintiff, intended, and that it was so understood by those hearing him, that the plaintiff was entertaining company which was not decent, and was running a gambling room in his house; that she was a woman of immoral character, using her body for commercial purposes, and that she had three men in her room with her for that purpose; that she was a young woman of lewd character, permitting men to enter her room and lock the door for sexual intercourse, and that she was in the habit of using intoxicating liquors. The defendant interposed a demurrer to this petition, which

was sustained by the court, and the plaintiff electing to stand on her petition, her action was dismissed.

The district court undoubtedly sustained the demurrer upon the theory that the words spoken did not charge a criminal offense, and, as the petition did not allege special damages suffered by the plaintiff on account of the alleged slander, that it did not state a cause of action. The defendant, by demurring to the petition, admits speaking words as alleged. Whether they would bear the construction placed upon them in the petition, and whether those hearing them so understood them, is, we think, a question for the jury, and not for the court. It is true that no innuendo can give to plain and unambiguous words a meaning different from that in which they are generally understood, but in this case it does not require any far stretch of the imagination to accept the meaning contended for by the plaintiff in the use of the words defendant admits he used in speaking of her. As said by the supreme court of Minnesota in *Stroebel v. Whitney*, 31 Minn. 384, 18 N. W. 98: "It is going too far to argue that words must *necessarily* bear a criminal import, in order to render them actionable *per se*. It is not enough to show by ingenious argument that they might possibly admit of some other meaning. * * * It is not necessary that the words should make the charge in express terms. They are actionable if they consist of a statement of facts which would naturally and presumably be understood by the hearers as a charge of crime." Newell, in his work, *Slander and Libel* (2d ed.), ch. 7, sec. 5, says: "There is no offense which can be conveyed in so many multiplied forms and figures as that of incontinence. The charge is seldom made, even by the most vulgar and obscene, in broad and coarse language. If the language used is such that in its ordinary acceptance a person of ordinary understanding could not doubt its signification it will be *prima facie* sufficient."

We have not had occasion to determine whether a charge of unchastity brought against an unmarried woman

is actionable *per se*. By the strict rules of the common law it was not; and special damages because of the charge had to be alleged and shown. That this rule was unsatisfactory to many courts is shown by the expression of the judges. In *Lynch v. Knight*, 9 H. L. Cas. 577, Lord Campbell said: "I may lament the unsatisfactory state of our law, according to which the imputation by words, however gross, on an occasion, however public, upon the chastity of a modest matron or a pure virgin, is not actionable without proof that it has actually produced special temporal damages to her." Lord Brougham, in a separate opinion, commenting on this statement, said: "Instead of the word 'unsatisfactory' I should substitute the word 'barbarous.'"

In *Smith v. Silence*, 4 Ia. 321, the supreme court of Iowa, on examining the question, mentions a number of states, among which are North Carolina, South Carolina, Indiana, Illinois, Kentucky and Alabama, in which the rule has been modified by statute; and other states, including Massachusetts, New Hampshire, Connecticut, Ohio and Pennsylvania, in which, by the decisions of their courts of last resort, it is now held that charging a woman, married or unmarried, with unchastity is actionable without proof of special damages.

It may be admitted that, if there was nothing else than the number of cases holding to the old common law rule, and if our action here had nothing else to influence or recommend it, we would be compelled to follow that rule; but as society is now constituted, a female against whom the want of chastity is established is driven beyond the reach of every courtesy and charity of life, and sometimes even beyond the portals of humanity. By common consent such an imputation is now everywhere treated as the deepest insult and the vilest charge that could be given or inflicted upon the victim or her friends. She is denied the society in which she has been wont to move. If in want of employment, her character is gone, and her chance for self-support is injured beyond redress. In our

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judgment, such a charge is more damaging in its effect than many which are most severely punished by our penal laws. If, as alleged by the plaintiff, the defendant, by the words spoken of her, meant, and intended to mean, that she was offering her body for sexual intercourse, or was the keeper of a room where gambling was carried on, and this was the meaning understood by those to whom the words were spoken, they are actionable *per se*, and no special damages need be alleged or shown in order to sustain the action.

We recommend a reversal of the judgment and remanding the cause for trial.

JACKSON, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

DAWES COUNTY, APPELLEE, v. SIOUX COUNTY, APPELLANT.

FILED NOVEMBER 22, 1906. No. 14,522.

Costs: CHANGE OF VENUE. The county from which a change of venue in a criminal case is taken is not liable to the county in which the trial is had for the fees of such jurors of the regular panel as did not sit upon the trial of that case.

APPEAL from the district court for Sioux county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

M. J. O'Connell, for appellant.

J. E. Porter, contra.

DUFFIE, C.

Charles Russell was informed against for the crime of murder in the county of Sioux. The venue was changed to

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Dawes county and the trial there had. We understand from the record that Sioux county has paid the *per diem* of the jurors actually sitting on the trial of the case, and refuses to pay for jurors drawn upon the regular panel and who did not sit upon the trial, but who were detained for five days during which the trial was in progress. The case was tried to the court without a jury, and judgment entered in favor of Dawes county for the amount claimed. From this judgment the county of Sioux has taken an appeal.

At the conclusion of the trial of the case of *State v. Russell*, the clerk of the district court for Dawes county made out a certified statement of all costs and fees in the case and forwarded it to the county clerk of Sioux county, and the county board of that county audited and allowed all such costs and fees except the *per diem* of the jurors of the regular panel who were not actually engaged in the trial of the case. No appeal was taken from the action of the board, and, while notice was given to the several jurors of the disallowance of a part of the claim made for their fees, no such notice was given to the county of Dawes. The appellant now claims that the only remedy existing in favor of any party dissatisfied with the action of the board was by an appeal to the district court, and that Dawes county, although having paid the fees, cannot present a second claim for the fees disallowed, but is barred of its remedy because of its failure, or the failure of the jurors, to take an appeal from the action of the board when the claim was first before them. We do not think it necessary to discuss the question of procedure. In our view of the case, the county of Dawes was entitled to recover jury fees to the amount only that was paid to the jurors actually sitting upon the trial. That part of section 456 of the criminal code, relating to the costs incurred on a change of venue in a criminal case, is as follows: "All costs, fees, charges, and expenses accruing from a change of venue, together with all costs, fees, charges, and expenses made or incurred in the trial of, or

in keeping, guarding, and maintaining the accused, shall be paid by the county in which the indictment was found, and the clerk of the trial court shall make a statement of the costs, fees, charges, and expenses aforesaid, and certify and transmit the same to the clerk of the district court where the indictment was found, to be by him entered upon his docket and collected and paid as if a change of venue had not been had." A statute nearly similar to our own has received a construction by the supreme court of Iowa. In the case of *Jones County v. Linn County*, 68 Ia. 63, it was held: "When a criminal cause is tried in a county other than the one in which the offense was committed, the latter county is liable to the county where the trial is had for *all* of the fees paid to the jurors engaged in the trial." If the jurors engaged in the trial of the case are to look to the county from which the change of venue was taken for their fees, which we do not determine, certainly the remainder of the regular panel should not be compelled to do so, and it is only the costs, fees, charges and expenses of the trial that are to be certified by the clerk of the court of the county where the trial is had to the clerk of the county where the indictment was found. We do not wish to be understood as saying just what charges and expenses may be collected from the county from which the change was taken, but we are satisfied that such county is not liable for the fees of the jurors of the regular panel not actually sitting on the trial.

We recommend a reversal of the judgment and remanding the cause for another trial.

JACKSON, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

FIRST NATIONAL BANK OF MADISON, APPELLANT, v. SCHOOL DISTRICT ET AL., APPELLEES.

FILED NOVEMBER 22, 1906. No. 14,483.

1. **Principal and Surety: CONTRACT: CONSTRUCTION.** Where a bond given by a contractor, conditioned on the faithful performance of a building contract on his part, provides that in case of default on his part the surety may take possession of the building and complete the work, and that in such event "the reserve in the hands of the owner (of the building), together with any other moneys due or to become due," shall be paid by the owner to the surety, in order to determine the rights of the surety under such provision the building contract proper and the bond should be construed together as constituting a trilateral contract *inter partes*.
2. ———. In such case, where the contractor defaults and the surety completes the building according to contract, the latter does not stand in the position of assignee with respect to the "reserve" in the hands of the owner and "other moneys due or to become due," but as an original party to the trilateral contract.
3. ———: **ASSIGNMENT.** Future earnings or profits under an existing contract either public or private are assignable.

APPEAL from the district court for Madison county:
JOHN F. BOYD, JUDGE. *Reversed with directions.*

Allen & Reed, for appellant.

Kennedy & Learned, Moyer & Foster, Mapes & Hazen, S. O. Campbell, M. D. Tyler and Samuel J. Tuttle, contra.

ALBERT, C.

This is an appeal from a decree of the district court for Madison county, directing the payment of a fund in court to certain of the appellees, and excluding the appellant from participation therein. There appears to be no dispute as to the facts. The record shows that on the 21st day of June, 1900, Frank Moore entered into a contract in writing with a school district in Madison county, whereby he agreed to erect a school building and furnish

the labor and material therefor for \$11,400, to be paid in instalments as follows: "On or about the first of each month during the progress of the work the architect shall prepare an estimate of the value of the materials furnished and the labor performed by the contractor during the preceding month and shall deliver such estimate in writing certified to over his signature to the contractor. Upon presentation of such estimate and certificate to the owner by the contractor the sum of 85 per cent. of the amount of such estimate will be paid by the owner to the contractor. The final payment shall be made within ten days after this contract is fulfilled." A bond in the penal sum of \$6,000 being required of the contractor, conditioned on the faithful performance of his part of the contract, he made written application therefor to the Fidelity & Deposit Company of Maryland, which application contains the following clause: "And I do further agree in the event of any breach or default on my part of the provisions of the contract hereinbefore mentioned that the Fidelity & Deposit Company of Maryland, as surety upon the aforesaid bond, shall be subrogated to all my rights and properties as principal in said contract, and that deferred payments and any and all moneys and properties that may be due and payable to me at the time of such breach or default or that may thereafter become due and payable to me on account of said contract shall be credited upon any claim that may be made upon the Fidelity & Deposit Company of Maryland under the bond above mentioned." The surety company furnished the bond, becoming surety thereon, which was accepted and approved by the school district on the 28th day of June, 1900. It contains, among other provisions, the following: "If the said principal shall abandon said contract or fail to comply with any or all of the conditions of said contract to such an extent that the same shall be forfeited, then said surety, upon the notice above stated, shall have the right and privilege in its option to sublet or complete said contract, whichever said surety may elect to do, provided it is done in accordance

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with said contract; and if said contract shall be sublet or completed by said surety, then the reserve in the hands of the said owner, together with any other moneys due or to become due, shall be paid by said owner to said surety, at the times mentioned in said contract, on account of any loss or expenses arising out of said contract and any loss or expenses sustained by said surety in subletting or completing said contract; and if said owner shall complete or relet the said contract, then all reserve, deferred payments and any or all other moneys and properties at that time due and payable or that thereafter may become due and payable to the said principal under and by virtue of said contract shall be credited upon any claim the said owner may make upon said surety because of the failure of said principal to comply with the terms of said contract; if any suits at law or proceedings in equity are brought against said surety to recover any claim thereunder, the same must be instituted within six months after the completion of the work specified in said contract." At the time the bond was furnished, and in accordance with the terms on which it was furnished, the contractor paid \$1,500 into the hands of the surety company as indemnity against loss or damage on its part by reason of its suretyship. The money with which this payment was made was borrowed by the contractor from the Bank of Colfax, Iowa, in pursuance of an arrangement wholly between him and that bank. Afterwards, and in pursuance of his contract, the contractor began the erection of the building and went on with the work until November 9, 1900, when he abandoned it. Whereupon the surety company, exercising the option given it by the quoted provision of the bond, took possession of the unfinished building, material, etc., and completed the building according to the terms of the contract.

On the 11th day of September, 1900, the contractor borrowed \$2,000 from the First National Bank of Madison, Nebraska, to pay for labor and material required in the erection of the building, and which was used for that

purpose, giving his note therefor, payable in 20 days after date, and bearing 10 per cent. interest. The note was not fully paid at maturity, and thereafter to secure the payment of the amount due thereon the contractor executed and delivered two instruments in writing to the First National Bank of Madison. The first bears no date, but was given October 3, 1900, and is as follows: "To the School Board of District No. 1. Gentlemen: I hereby assign my fourth estimate on my school contract to the First National Bank of Madison, Neb., or so much thereof as will be necessary to pay the balance of a \$2,000 note after applying my present third estimate of \$765, and I hereby authorize the architect to send said estimate to the said bank and I also authorize the school board to draw the warrants in their favor. In case the 4th estimate should not be sufficient to pay above claim I include the fifth estimate on the same conditions. Frank Moore." The second is in these words: "Madison, Nebraska, Oct. 27, 1900. I hereby assign to the First Nat'l Bank of Madison, Nebraska, any and all money due and to become due me on my contract with School District No. 1 of Madison county, to an amount sufficient to pay said bank the balance due on one promissory note in the sum of \$2,000, on which \$765 has been paid, and one note of \$200, with interest on both notes. And I hereby authorize the architect, J. C. Stitt, to send my future estimates to said bank until said notes shall be fully paid; and I authorize and direct the board of trustees of said school district to draw the warrant or warrants for said money to said bank. My intention being that this assignment shall cover the first money to become due and payable under said contract. In presence of Peter Rubendall. Frank Moore." The foregoing instruments were presented to the school district by the bank and two payments made thereon by the former, one of \$765 on October 8, 1900, another of \$309.50 on November 9 of the same year. On the 9th day of November, 1900, the contractor gave the Bank of Colfax, Iowa, an order in writing on the surety company for the

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\$1,500 he had paid over to it as indemnity against loss or damage on its part, and a few days later an assignment in writing of all moneys not exceeding \$3,000 due and accruing to him under his contract with the school district. The surety company had immediate notice of the order and assignment. In September, 1901, suit was brought against the surety company in the state of Iowa by the Bank of Colfax on the order given by the contractor November 9, 1900, and such suit was pending when the case at bar was decided. On the 3d day of December, 1900, the Omaha Hydraulic Press Brick Company brought suit aided by attachment in the county court of Douglas county against the contractor on an account for goods, wares and merchandise sold and delivered to him, wherein the surety company was summoned as garnishee. The garnishee answered, and service on the defendant was had by publication. In that case the court found \$219.94 due the plaintiff therein, and gave it a lien on the funds in the hands of the surety company, ordering the company as garnishee to pay sufficient thereof into court to discharge the amount found due the plaintiff, with costs of that suit. A summons in garnishment issued against the surety company on the 14th day of December, 1900, on a judgment for \$381.45, and costs, rendered in favor of James B. Hume and against the contractor in the county court of Madison county, but transcribed to the district court of that county, the writ in question issuing from the district court. The garnishee answered April 23, 1903, but no order appears to have been made thereon.

After the surety company had undertaken to complete the school building, certain payments on the contract price were made direct to it by the school district, which, with the amounts theretofore paid to the contractor, or on his orders, and a small amount of damage for delay in the completion of the building deducted from the entire contract price, left a balance of \$1,802 due and owing from the school district by the terms of the contract. As there were several claimants for this fund and the school dis-

trict could not with safety decide between the rival claimants, the money was paid into court in order that the rights of the several parties might be litigated and determined. The First National Bank of Madison came in and laid claim to a sufficient amount of the fund to pay the remainder due on the \$2,000 note it had taken from the contractor, basing its claim on his assignments to the bank hereinbefore set out. The surety company came in, alleging that after giving credit for all payments made direct to it by the school district, and for the \$1,500 indemnity money paid it by the contractor when the bond was given, there was a certain remainder due it for the expense incurred in the completion of the building, and insisting that such remainder should be a first charge against the fund in court by virtue of the provisions of the bond. It also claimed to be entitled to the entire fund to protect itself against the claims of the Bank of Colfax and others not necessary to mention at this time. The brick company and Hume came in, claiming a right to a portion of the fund by virtue of their respective proceedings in garnishment. The Bank of Colfax, although made a party and constructively served, made default. There were other claimants, but they were cut out by the decree and have acquiesced therein. On the 13th day of March, 1905, the court entered a decree for the distribution of the fund. It found the remainder due the surety company for the completion of the building, after deducting the payments made to it by the school district and the \$1,500 indemnity money, \$685.05, and that the same was a first charge against the fund in court. The claim of the brick company was found to be \$293.60, and that of Hume \$524.89, and to be second and third charges respectively against the fund. The court further found that the surety company was entitled to the residue of the fund for the purpose of protecting itself against the claims of the Bank of Colfax. As to the claim of the First National Bank of Madison, the court found that the remainder due on the \$2,000 note at the date of the decree was \$1,362.50, but

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that the bank had no right or interest in or to the fund in controversy. From a decree entered in accordance with the foregoing findings, the First National Bank of Madison appeals.

The appellant contends that the contractor's obligation to the surety company with respect to its succession to his right to payment from the district amounts to no more than "an agreement for a future assignment dependent on the condition precedent of a 'breach or default' on the part of Moore (contractor) in fulfilling his contract with the school district." This contention is based on that portion of the application hereinbefore quoted, the argument being, in substance, that, as the application preceded a binding contract between the contractor and the school district, the contractor's rights under such contract did not have even a potential existence when the application was made and therefore were not assignable. That argument would be of doubtful validity even were we to assume that the quoted language of the application amounts to an assignment, or attempted assignment, of the contractor's rights under his contract with the school district to the surety company. The application, until accepted by the surety company, was a mere offer, and did not become binding until the bond furnished thereon had been accepted and approved by the school district. On the other hand, the contract between the contractor and the school district was not perfected and did not become binding and effective until the bond had been accepted and approved by the school district. The two contracts, therefore, are interdependent, and became binding and effective at the same instant. It may be said in passing that the quoted clause of the application is substantially included in the quoted provisions of the bond. Whether an assignment of a subject matter which becomes potentially existent at the very instant the assignment is executed is valid, is a question we do not feel called upon to decide at this time, because, in our opinion, the surety company's relation to the fund is not that of an assignee, or one claim-

ing as assignee, but of an original party to what we regard as the contract *inter partes*. As we have seen, the building contract proper and the bond are interdependent and took effect at the same instant. They should be construed together as constituting a trilateral contract. According to the terms of such contract, so constituted, the school district was to pay \$11,400 for the erection of the building. In case the contractor completed the building according to the terms of the contract the entire contract price was to be paid to him. But in case of default on his part and the completion of the building by the surety company in pursuance of the provisions of the bond," then the reserve in the hands of the said owner (school district), together with any other moneys due or to become due," was to be paid to the surety company "at the times mentioned in said contract," not as assignee, but as one of the parties to the trilateral contract. The decree of the district court to the extent that it makes the balance due the surety company a first charge against the fund in controversy is right.

This brings us to the contest between the appellant and the parties claiming by virtue of their proceedings in garnishment. As we have seen, the assignments under which the appellant claims are prior in point of time to either of those proceedings. Those claiming under such proceedings contend that the assignments to the appellant are of no effect because the subject matter of the assignments had no actual nor potential existence when they were made. This contention cannot be sustained. At the time the two assignments were made there was a valid and existing contract between the contractor and the school district, and his rights thereunder were assignable. As was held in *Perkins v. Butler County*, 44 Neb. 110: "An assignment of moneys not yet earned, but expected to be earned in the future under an existing contract, is in equity valid and enforceable." The rule is thus stated in 4 Cyc. 17: "Anticipated profits under existing agree-

ments may be assigned, although the contract under which the work is done may be indefinite as to the time of employment and the amount to be paid for the work." One of the cases cited in support of the text is *Morrill v. Noyes*, 56 Me. 458, 96 Am. Dec. 486, where the rights of an agent under a contract, whereby he was to receive commissions on renewal premiums to accrue annually for a given period, were held assignable. See, also, 4 Cyc. 20, and cases cited. The foregoing rule, according to the great weight of authority, is applicable to both public and private contracts, in the absence of a statutory rule to the contrary. This proposition was at least tacitly recognized in *Perkins v. Butler County*, *supra*. See *Fortunato v. Patten*, 147 N. Y. 277; *Hipwell v. National Surety Co.*, 130 Ia. 656; *Dickson v. City of St. Paul*, 97 Minn. 258; 4 Cyc. 22. The assignments to the appellant, therefore, were valid, and operated as a transfer *pro tanto* of the contractor's interest in the trilateral contract. That interest, at the time the assignments were made, was the then unpaid remainder of the contract price, plus the \$1,500 indemnity money paid the surety company, less the cost and expenses incurred by the surety company in the completion of the building and by reason of the contractor's default. Such cost and expenses, after deducting the payments made direct to the surety company by the school district and the \$1,500 indemnity money, amounted at the date of the decree to \$685.05, and bears interest at 7 per cent. per annum. The fund in court, then, representing the remainder due on the contract price, less the remainder due the surety company, is covered by the assignments to the appellant bank, and should be applied on the amount found due it, which, with the remainder due the surety company, exceeds the fund in court. Consequently, there would be nothing left for the other claimants, and a discussion of their rights *inter se* would be profitless.

As to that portion of the decree which permits the surety company to take and hold any portion of the fund to protect itself against the claims of the Bank of Colfax,

little need be said. The claim of that bank is based on an order or assignment made long subsequent in point of time to those of the appellant. Nothing could pass by such an assignment giving the Bank of Colfax a claim against the surety company, save such remainder as might remain in its hands after the accounts between itself and the contractor had been adjusted. As we have seen, upon an adjustment of those accounts, nothing was found due the contractor but a remainder in favor of the surety company, which the court ordered paid out of the fund in court. As there was nothing due the contractor from the surety company on a final adjustment of the accounts between them, nothing passed by virtue of the order or the assignment given by the contractor to the Bank of Colfax, and it has no claim against the surety company by virtue thereof. Whether it thereby acquired any rights against the school district is another question, but, if it did, it is not asserting them; and, if it were, they are junior and inferior to those of the appellant. We know of no reason, and there is certainly nothing in the contract, that would warrant the court in allowing the surety company to take and hold a portion of the fund to protect itself against a groundless claim asserted in a foreign jurisdiction. The decree, to the extent that it gives the garnishing creditors priority over the appellant, excludes the appellant from participation in the fund, and permits the surety company to take or retain any portion of the fund over and above the remainder found due it, with interest, is erroneous, but in all other respects is right. It would seem, however, that a new decree is desirable, rather than a modification or correction of that entered by the district court.

It is therefore recommended that the decree of the district court be reversed and the cause remanded, with directions to enter a decree conforming to the views expressed in the foregoing opinion.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded, with directions to enter a decree in accordance with said opinion.

JUDGMENT ACCORDINGLY.

BARNES, J., not sitting.

**BENJAMIN C. SAMMONS ET AL., APPELLANTS, V. KEARNEY
POWER & IRRIGATION COMPANY ET AL., APPELLEES.**

FILED NOVEMBER 22, 1906. No. 14,489.

1. **Mortgages: SUBSEQUENT CONVEYANCES.** While the general rule is that a subsequent purchaser or lessee of mortgaged property taking under a conveyance or lease from the mortgagor takes subject to the mortgage, yet, where the mortgage in express terms or by clear implication authorizes the mortgagor to make such sales or leases for the benefit of the mortgagee, a sale or lease made in pursuance of such authority is binding on the mortgagee and those claiming under him.
2. **Quasi Public Corporations: DISCRIMINATION.** A corporation formed for the purpose of supplying water or water power is a *quasi* public corporation, and as such is bound to serve the public without unjust discrimination.
3. ———: **CONTRACTS: VALIDITY.** A clause of a contract of a corporation of that character which, if enforced, would prevent its serving the public on such terms is illegal and void.
4. **Mortgages: FORECLOSURE: LEASE: VALIDITY.** In a suit for the foreclosure of such mortgage, and where the lessee is a party asserting the priority of his lease, the extent to which such lease is valid and enforceable is a legitimate subject of inquiry and adjudication.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

E. C. Calkins, for appellants.

*John L. Webster, B. R. Dysart, John N. Dryden and
H. M. Sinclair*, contra.

ALBERT, C.

The Kearney Power & Irrigation Company is a corporation organized under the laws of this state. The general nature of the business of the corporation is thus stated in its articles of incorporation: "The owning, constructing and operating canals, reservoirs, dams, and other works for irrigation and water power purposes, including the power to lease its own property, and to acquire by purchase such canals, reservoirs, and other works for irrigation and water power purposes and the application of such power to all purposes, including the power to execute mortgages or deeds of trust to secure such bond or bonds as may or shall be issued by the said company in furtherance of the objects of its incorporation." On the 15th day of July, 1898, it executed and delivered to the Mercantile Trust Company of New York, as trustee, a mortgage on a ditch or canal near the city of Kearney, including the right of way and other property and rights, to secure a bond issue of \$150,000 in bonds of \$500 each. Of these bonds only 274 were disposed of, the remaining 26 require no further mention. On the 1st day of November, 1889, the mortgagor entered into a contract in writing with the Northwestern Electric Heat & Power Company, a corporation, whereby for a consideration therein named the latter was given the right to take water from the canal in question for the period of 15 years, with the privilege of a renewal of the contract on the same terms for an additional 15 years, at its option, for the purpose of furnishing power for its electrical machinery. Default was made in the payment of the interest on the bonds, and on the 9th day of September, 1903, Sammons brought this suit to foreclose a mortgage, alleging that he was the holder of 239 of the bonds. The defendants all defaulted. Sarah Miller, claiming to be the owner and holder of some of the bonds, was permitted to intervene and joined in the prayer of the plaintiff for a foreclosure of the mortgage. The Northwestern Electric Heat & Power Com-

pany was permitted to intervene and set up its rights under its contract with the Kearney Power & Irrigation Company, the mortgagor. The court found in favor of the plaintiff and the intervener Sarah Miller in the full amount of the bonds which they respectively claimed to own, with the accrued interest thereon, and ordered a sale of the property for the satisfaction of the full amount of outstanding bonds and interest, but provided in the decree that such sale should be subject to the rights of the intervener, the Northwestern Electric Heat & Power Company, under its contract with the mortgagor, and that such contract should be binding upon the purchaser at such sale. Both the plaintiff and the intervening company appeal.

The plaintiff assigns several errors, but they all turn on the single question: Did the court err in providing in the decree that the sale thereunder should be subject to the rights of the intervening company under its contract with the mortgagor? The plaintiff invokes the general rule to the effect that, where a corporation mortgages its property, the mortgagee is not bound by subsequent contracts of the mortgagor with respect thereto, whether such contracts are leases, sales, mortgages, or other contracts. 3 Cook, Corporations (5th ed.), sec. 860; 5 Thompson, Commentaries, Law of Corporations, sec. 6239; Jones, Railroad Securities, secs. 567-569. See also 41 Cent. Dig. "Railroads," sec. 685. The foregoing rule is easily recognizable, as it is grounded on the general rule applicable to all mortgages that an interest subsequently acquired by a third party in the mortgaged property is subject to the mortgage; but the question is whether the facts in this case bring it within that rule. It will be conceded, notwithstanding the positive language in which such rule is stated, that it would be competent for the parties to a mortgage to take it out of the operation thereof by express stipulation. That is to say, that, in case the mortgage should expressly provide that the mortgagor should be authorized to lease the property or portions

thereof, or enter into contracts with respect thereto, and that such leases and contracts, when made, should pass to the mortgagee as further security for the mortgage debt, leases and contracts made by the mortgagor in the exercise of such authority would be valid and binding as against the mortgagee and those claiming under him. It will also be conceded that the same result would follow whether such authority rest on express grant or clear implication. Hence, in order to determine whether the mortgagor had authority under the mortgage to make the contract or lease under which the intervening company claims, an examination of the provision of the mortgage becomes necessary. It is not claimed that such authority is expressly given. It remains to determine whether it is given by implication. The solution of this question is to be found, we think, in the familiar rules of construction applicable to the facts in this case, rather than in precedents resting, as they must, on instruments differing materially from that under consideration.

The granting clause of the mortgage, after describing the canal and right of way, is as follows: "Together with all reservoirs, dams and lakes connected with or forming a part of said canal, including three lakes now known as 'Lake Echo,' 'Lake Greenwood' and 'Lake Kearney'; also all parcels and tracts of land purchased for or used by such company in the construction of head gates or basins or other purposes connected with the said canal; and also the right and franchises of said company to construct, maintain, operate or use said canal, and to lease or sell waters therefrom for irrigation, town, city, power or other purposes, and all erections and buildings, and all machinery of every kind, nature and description, engines, reservoirs, pumps, wells, pipes or other constructions of every kind and description, tools, implements and fixtures of every kind and nature made, manufactured, constructed, built, laid, purchased or in any way acquired in or about the construction, maintenance and operation of said canal, and which may hereafter be made, manufac-

tured, constructed, built, laid, purchased or acquired in or about the construction, maintenance and operation of the said canal, and all the income, rents, profits, emoluments and moneys derived by or from said irrigation company, including all revenues from all sources whatsoever; together with all and singular the tenements and appurtenances thereunto belonging, and the reversions, remainders, tolls, incomes, rents, issues and profits thereof, and also the estate, title and interest of all kinds whatsoever as well at law as in equity of the said mortgagor, the Kearney Power & Irrigation Company, in and to the same and every part thereof; and also all the rights, franchises, easements and rights of way connected with and belonging to the above mentioned irrigation company; and also all things in action, contracts, leases, claims and demands of the said irrigation company, as well as all franchises of every kind or nature, rights, privileges and immunities of the said irrigation company, including all right of way in, through or over streets, avenues, lanes, alleys, lands, public grounds, bridges and other public and private places now owned by said irrigation company or hereafter acquired by said irrigation company, and all property of every kind and nature, real, personal and mixed, now owned or which may hereafter be acquired by the irrigation company. It being intended, however, that the foregoing description of the real estate of the irrigation company is not to exclude any piece or parcels of land whatever not herein especially described, now owned by the irrigation company or hereafter acquired, from passing to the trustee under this indenture." The habendum clause, so far as is material at present, is as follows: "To have and to hold all and singular the said property of every kind of the said irrigation company, together with its appurtenances, franchises, buildings, machinery of all kinds, tools, implements and fixtures of every kind and other appurtenances now owned or possessed or to be hereafter acquired by the said irrigation company, and all other premises, property, rights, interests, franchises,

leases, revenues, tolls, incomes, immunities, privileges and other things aforesaid now owned or hereafter acquired by the said irrigation company to the trustee as aforesaid, and its successors and assigns in trust." The mortgage contains further provisions, among which is this: "Eleventh. The irrigation company, for itself, its successors and assigns, doth hereby covenant and agree to and with the trustee and its successors in trust, and to and with the respective persons, firms and corporations who shall at any time be holders of the bonds hereby secured, that the said irrigation company, its successors and assigns, shall and will at any time, and from time to time hereafter, and at its own proper expense, make, execute and deliver such other and further acts, deeds, conveyances, assignments and assurances in law for the better assurance of the said trustee and its successor or successors in the trust hereby created upon the trust and for the purpose herein expressed or intended, upon all and singular the aforesaid described property, real, personal and mixed, including all rights, privileges and franchises of every kind whatsoever hereby mortgaged or conveyed in trust, or intended to be now owned or vested in the said irrigation company, its successors and assigns, as the said trustee and its successors shall be reasonably advised or required, so as to render not only all the property rights and franchises of every kind and nature herein conveyed, but also as well and especially such portion thereof as shall be hereafter acquired by the irrigation company, available for the security and satisfaction of the said bonds and each, and all of them, according to the intent and purpose of this mortgage or deed of trust expressed."

From the portions of the mortgage just quoted it clearly appears (1) that the mortgage covered all the property of the mortgagor of every character; (2) that the mortgage was intended to cover not only such things in action, contracts, leases, claims and demands as existed when the mortgage was given, but all such as the mortgagor might thereafter acquire; (3) that such things in action, con-

tracts, leases, claims and demands as the mortgagor might subsequently acquire should be duly assigned to the mortgagee as further security for the mortgage debt. But, when the construction of a contract becomes necessary, it is permissible to look beyond the language of a contract and take into account the nature of the subject matter, the condition and situation of the parties, and the facts and circumstances surrounding the transaction. The mortgagor was a corporation, and one of the purposes of its organization was to lease water rights. It was the owner of a plant designed to serve that purpose, but which, as the record shows, yielded no revenue, save such as might be derived from the sale or leasing of water rights. The bonds by their terms were made to run for a period of 20 years, and the interest thereon is payable semiannually. Now, taking into account these facts and circumstances in connection with those provisions of the mortgage hereinbefore set out, it is too clear to admit of argument that the parties to the mortgage at the time it was made contemplated that the mortgagor's plant covered by the mortgage should be maintained as a going concern, because in no other way could it meet the interest on the bonds from time to time, to say nothing of the discharge of the principal debt when it became due. But we must also take into account the nature of the uses for which water or power from the canal could be sold or leased. Such uses imply a large preliminary outlay on the part of those buying or leasing a water right. No business man would make such outlay if the only contract he could make for the use of water were one liable to be terminated at any time. Now, while the mortgage debt was to run 20 years, yet by the terms of the mortgage it might upon certain conditions be declared due and payable in case of default in the payment of the interest, which was to be paid semiannually. Hence, unless the mortgagor had implied authority to bind the mortgagee by contracts and leases like that under consideration, no one entering into a contract or lease for the use of water

or water power would have any assurance that his contract or lease would not be terminated at any time. The parties to the mortgage must have known that no one would care to enter into a contract subject to such hazards. Consequently, it is fair to presume that, when the authority to maintain a going concern was given, it was intended that the authority to do the things reasonably necessary to that end should go with it. A chattel mortgage on a stock of goods, which contained a provision whereby the mortgagor was given possession with power to sell in the usual course of business, the proceeds to go in satisfaction of the mortgage debt, is valid as against creditors if made in good faith. *Davis v. Scott*, 22 Neb. 154; *Lepin v. Coon*, 54 Neb. 664. *A fortiori* it is valid as between the parties, and therefore binding upon the mortgagee and those claiming under him. The principle which makes such provisions binding upon the parties to a chattel mortgage and those claiming under them applies, we think, with equal force to the provisions of the mortgage now under consideration.

The plaintiff presents an argument of considerable force against the construction we have just placed upon the mortgage, which is based on the following state of facts: During the negotiations leading up to the execution of the mortgage, it appears to have been understood that the canal and entire plant covered by the mortgage should be leased to the Kearney Cotton Mills for a term of ten years, with the privilege of an additional term of ten years, for a rental equal to 4 per cent. per annum of the amount of the prospective bond issue actually issued, the rent to be paid semiannually to the holder of the mortgage securing the bonds. A few days prior to the execution of the mortgage the mortgagor executed a lease on those terms to the Kearney Cotton Mills. The lease provided, among other things, that upon the nonpayment of the whole or any portion of the rent when the same should become due and payable, or upon a breach of any of the covenants and agreements of the lease by the lessee,

the lessor (the mortgagor) might, at its election, declare the lease at an end and recover possession of the property by summary proceedings in forcible detainer. The plaintiff argues that this is the only lease the parties to the mortgage had in contemplation when the mortgage was executed, and that such lease being of the entire plant precludes the idea that the mortgagor had implied authority to make leases and contracts with respect to the property with other parties which would be binding upon the mortgagee. But the provisions of the lease show that the parties took into account the contingency that the lessee might fail to pay the rent, or perform some other covenant of the lease on its part to be performed, and provided against it, giving the lessor the right upon the happening of such contingency to declare the lease at an end. Had the lease been the only one in contemplation of the parties at the time the mortgage was given, instead of speaking of leases, and attempting to cover not only such as were then in existence, but all such as should be made in the future, the plaintiff's argument upon this state of facts would be unanswerable. But, taking into account that the lease provided that it might be terminated at any time upon the happening of certain contingencies, and that the mortgage covers not only leases which were in existence when it was made, but all contracts and leases which might thereafter be made, and provides for their assignment to the mortgagee as further security for the mortgage debt, the argument is not convincing. No question of fraud arises. The evidence shows that the contract is fair and reasonable. Therefore, taking into account the provisions of the mortgage, the nature and condition of the subject matter, the situation of the parties at the time the mortgage was given and the attending facts and circumstances, we are satisfied that the mortgagor had authority to bind the mortgagee by the contract in question.

This brings us to the intervenor's cross-appeal. Its contract for the use of water contains this clause: "The

party of the first part further agrees not to sell water for power to any person or corporation intending to compete with the party of the second part (intervener) in the generation of electricity for sale." The trial court held the foregoing clause to be contrary to public policy and void, and the intervener contends that the decree to that extent is erroneous. In support of this contention many cases are cited wherein exclusive franchises to operate ferries, construct bridges, or to supply cities with water or gas for a limited time have been upheld. See *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water-Works Co. v. Rivers*, 115 U. S. 674; *Louisville Gas Co. v. Citizens Gas. Co.*, 115 U. S. 683; *Citizens Water Co. v. Bridgeport Hydraulic Co.*, 55 Conn. 1; *Des Moines Street R. Co. v. Des Moines Broad Gauge Street R. Co.*, 73 Ia. 513; *Davenport Gas & Electric Co. v. City of Davenport*, 124 Ia. 22; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. (U. S.) 116; *The Binghamton Bridge*, 3 Wall. (U. S.) 51. The distinction between those cases and the case at bar is obvious. A municipal corporation is an instrumentality of the state for the better administration of government in matters of local concern. *United States v. New Orleans*, 98 U. S. 381. The main purpose of its creation is the exercise of certain governmental functions within a defined area. While it has the power to make contracts and transact other business not strictly governmental in character, such powers are incidental or auxiliary to its main purpose. In none of the cases cited was there any attempt on the part of a municipality to restrict its governmental functions, or to place itself in a position where it would be incapable of carrying out the purpose for which it was created. In the case at bar we are dealing with an irrigation company—a quasi public corporation. It also is a governmental agency, but its main purpose is the administration of a public utility. To the extent of its capacity it is bound to furnish water from its canal to persons desiring to use it on equal terms and without discrimination.

In this respect it stands on the same footing as a railroad company. Neither has the right or power to place itself in a position where it cannot serve every person on equal terms with every other person. Neither has the right or the power to bind itself by contract which, if enforced, would render it unable to serve the public on those terms or to carry out its main purpose. In *State v. Hartford & N. H. R. Co.*, 29 Conn. 538, where a railroad company had placed itself in such a position, Ellsworth, J., pertinently asks: "What right have they to covenant with that corporation that they will not run cars to tide water, as the charter provides that they shall and as the public accommodation requires?" And with equal force it may be asked in this case: What right had the irrigation company, bound by the very nature of its organization to furnish water to the public without discrimination, to bind itself by the clause in question which would prevent it performing such services? In *Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, one of the propositions of law laid down is that a corporation owing a duty to the public cannot make a valid contract not to discharge such duty. From this proposition it would necessarily follow that, where a corporation owes a duty to the public generally, it cannot bind itself by contract to serve one person to the exclusion of all others. In *West Virginia T. Co. v. Ohio River P. L. Co.*, 22 W. Va. 600, 46 Am. Rep. 527, a landowner had granted to an oil transportation company the exclusive right of way and privilege of laying and maintaining pipes for transporting oil through a tract of 2,000 acres, and the contract was held invalid, as an unreasonable restraint of trade and contrary to public policy. In that case a large number of authorities are reviewed, among which are many wherein contracts in restraint of trade have been upheld, and others again where they have been held void as against public policy. The court there holds that the test is whether the restraint is prejudicial to the public interest, and then uses this language:

"From the principles, which underlie all the cases, the inference must be necessarily drawn, that if there be any sort of business, which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however *partial* on this peculiar business, provided of course it be shown clearly, that the peculiar business thus attempted to be restrained is of such a character, that any restraint upon it however *partial* must be regarded by the court as prejudicial to the public interest. Are there any sorts of business of this *peculiar* character? It seems to me that there are, and that they have been recognized as possessing this peculiar character both by the statute law and by the decisions of the court. Are not *railroading* and *telegraphing* forms of business, which are now universally recognized as possessing this *peculiar* character?"

The principle involved in the case at bar does not, as it appears to us, differ from that involved in the case from which we have just quoted. The business of the irrigation company is of the peculiar character mentioned by the West Virginia court. In the latter there was an attempt to give one person engaged in transporting oil an exclusive right to occupy certain lands for that purpose, to the exclusion of all others who under the laws of that state had an equal right to use the land, after proper condemnation proceedings, for the same purpose. Here there was an attempt to give the intervener an exclusive right for a term of years to use water which under the law the irrigation company was bound to furnish to the public on equal terms, and the one, no less than the other, is contrary to public policy and illegal.

But the intervener takes the position that the question of the validity of that clause of the contract is not involved in this case and, consequently, that the determination thereof by the trial court is error. This position is clearly untenable. The intervener came into court asserting the priority of its rights under its contract with the

mortgagor. Such contract or lease is in the nature of a prior incumbrance, and it was eminently proper for the court to ascertain and determine the nature and extent of such incumbrance. The position of the intervener is analogous to that of a first mortgagee who appears in a case asserting the priority of his lien, but not asking its foreclosure. In such cases the propriety of finding the amount due on the first mortgage and ordering a sale subject thereto has never been questioned. Whether the intervener, because of the public service required of it by its contract with the city of Kearney, would be entitled to a preference over those using water for private purposes is a question that does not arise at this time; and, when it does, if it ever does, we apprehend it will turn on questions of public policy rather than the contractual rights of the parties.

Other questions are presented by the cross-appeal; but, in the view we have taken of the case, they are not such as affected the rights of the intervener, consequently they will not be considered.

It is recommended that the decree of the district court be affirmed.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

GEORGE CARMACK, APPELLANT, v. LOUIS ERDENBERGER,
APPELLEE.

FILED NOVEMBER 22, 1906. No. 14,506.

1. Appeal: MOTION FOR NEW TRIAL. The change made by the act of 1905 in the procedure to obtain a review of a judgment at law in a civil case leaves the rule with respect to the necessity of a motion for a new trial unchanged.

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2. **New Trial: PROCEDURE.** The statute requiring a motion for a new trial to be in writing and filed during the term at which the "verdict, report or decision" is rendered, and, except for the cause of newly discovered evidence, within three days after the verdict or decision is rendered, unless unavoidably prevented, is mandatory.
3. ———: **POWER OF COURT.** A court has no authority to rule on a motion for a new trial which has not been filed and is not before it, in anticipation that such motion may be subsequently filed.
4. **Appeal: MOTION FOR NEW TRIAL.** A motion for a new trial, filed out of time and not coming within any of the exceptions of the statute, is of no avail for the purposes of a review of errors in this court.

APPEAL from the district court for Cedar County: GUY T. GRAVES, JUDGE. *Affirmed.*

B. Ready and C. H. Whitney, for appellant.

J. C. Robinson, contra.

ALBERT, C.

This is an appeal from a judgment at law. The errors assigned are with respect to rulings made during the trial proper, and the sufficiency of the evidence to sustain the judgment. In short, only such errors are assigned as have been heretofore required to be brought to the attention of the trial court by motion for a new trial in order to obtain a review in this court.

Two questions are presented which, in our opinion, are decisive of this case. The first is: Has the amendment to our appellate procedure changed the rule with respect to a motion for a new trial in an action at law? This question must be answered in the negative. The reasons underlying the rule requiring the motion for a new trial are as urgent and forceful under the amended procedure as under the procedure whereby a review was obtained by a petition in error. As was said in *State v. Swarts*, 9 Ind. 221: "It is due to the lower court that its errors, if

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any, should be pointed out there, so that it may retrace its steps while the record is yet under its control." In *Mills v. Miller*, 2 Neb. 299, 317, this court said: "Before a party is entitled to be heard here, he must have exhausted his remedy in the court below. For that purpose he must have presented the several questions of law fairly and fully, and must have obtained an unequivocal ruling thereon." The language in both of those cases is quoted with approval in *Cropsey v. Wiggenhorn*, 3 Neb. 108. The exception with respect to suits in equity was due to the fact that an appeal from a decree in such suits under the former statute brought the case here for trial *de novo*, and not for a review of errors of law.

The next question is: Does the record show that the alleged errors were brought to the attention of the trial court by motion for a new trial in the manner required by law? The judgment was rendered on the 5th day of June, 1905, and the term at which it was rendered adjourned *sine die* on the following day. Up to the time of final adjournment no motion for a new trial had been filed, although following the judgment entry, and of the date of the judgment, is an order overruling a motion for a new trial. Two days after the final adjournment of the term a motion for a new trial was filed. Section 316 of the code provides: "The application for a new trial must be made at the term the verdict, report, or decision is rendered, and, except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented." The motion in this case is not based on the ground of newly discovered evidence, nor is there any showing that its filing in due time was unavoidably prevented; hence, the general provisions of the statute control. In *Fox v. McEacham*, 6 Neb. 530, it was held that a motion filed out of term was of no avail, unless falling within the exception mentioned in the statute. In that case the court

quoted with approval *Williams v. St. Louis Circuit Court*, 5 Mo. 248, to the effect that, although the motion be filed out of time, the court, upon a suggestion that substantial justice had not been done, might look into the matter or not; but, if it should refuse to do so, error would not lie. This court has never departed from the rule announced in *Fox v. Meacham*, *supra*. It was reaffirmed in *Nebraska Nat. Bank v. Pennock*, 59 Neb. 61, where the court, going a little farther, held that the provisions of the statute as to the time for filing a motion for a new trial were not directory, but mandatory, citing a large number of cases in support of that proposition.

The appellant contends that the record with respect to a motion for a new trial discloses a common practice; that is, that the courts frequently, during the hurry incident to the closing days of the term, rule on a motion in anticipation of one to be filed subsequently, and that, where this is done, the defeated party by custom is allowed to file his motion at any time within three days from the adjournment of the term. The trouble with that contention is that the alleged custom runs counter to the statute. Section 317 of the code provides that the application for a new trial must be by motion, upon written grounds, filed at the time of making the motion. Under the statute there is no such thing as an oral motion for a new trial, because the statute is mandatory that the application must be made by motion, upon written grounds, filed at the time of making the motion. The court has no authority under the statute to pass on a motion that has not been filed, or in anticipation of one being filed. It is also insisted that the appellee is precluded from raising this question, because he made no objection or protest in the district court. We are unable to see how he was called upon to enter a protest at that time. The ruling of the court in anticipation of a motion to be filed was in his favor, and we know of no way he could have prevented the filing of a motion in vacation, had he undertaken to do so. The errors assigned in this

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court are of such a character that they are reviewable only after they have been brought to the attention of the trial court by motion for a new trial. The motion filed was filed out of time, and, under the repeated holdings of this court, is of no avail. It necessarily follows that the errors complained of cannot be reviewed in this court, and, consequently, that the judgment of the district court, supported, as it is, by the pleadings, must be affirmed.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

**FIRST NATIONAL BANK OF SUTTON, APPELLEE, v. SUTTON
MERCANTILE COMPANY, APPELLANT.**

FILED NOVEMBER 22, 1906. No. 14,511.

1. **Judgment: DEFAULT.** Where there is an answer on file setting up a valid defense, the fact that the defendant fails to appear either in person or by attorney when a cause is reached for trial does not entitle the plaintiff to a judgment without proof of the facts constituting his cause of action, unless the facts admitted by the answer make out a *prima facie* case in his favor.
2. **Appeal: PRESUMPTIONS.** The presumptions in favor of the regularity of the proceedings of superior courts are of no avail against facts shown by the record itself.
3. **Judgment on Pleadings: REVIEW.** Where a judgment at law is rendered on the pleadings alone, a motion for a new trial is not necessary to obtain a review in this court.

APPEAL from the district court for Clay county: **ROBERT C. ORR, JUDGE.** *Reversed.*

Paul E. Boslaugh, John A. Moore and Hall, Woods & Pound, for appellant.

T. H. Matters, contra.

ALBERT, C.

The First National Bank of Sutton, Nebraska, brought an action in the district court against the Sutton Mercantile Company on a promissory note purporting to have been given by the defendant to a third party, and by such third party transferred by indorsement to the plaintiff. The note is negotiable in form and purports to have been signed on behalf of the defendant by Charles Coleson, its secretary. In addition to the usual allegations on a promissory note, the petition filed by the plaintiff contains the following: "The plaintiff further alleges that said Charles Coleson was duly authorized by direct agreement and consent of all the stockholders, directors and officers of said association to sign said note, and that said Coleson was authorized to, and did, sign all notes, checks and drafts for said company while he remained as stockholder and secretary of said company, and which is, by general consent of said organization, the duty of the secretary of the Sutton Mercantile Company to sign all notes, drafts and checks for said company. Plaintiff further alleges that after knowledge of all the facts, that is, after knowledge of the signing of said note by the said Charles Coleson, secretary of said company, said corporation kept, retained and used the property for which the note hereinbefore set out was given." After a general denial of each and every allegation contained in the petition not subsequently admitted, the answer, while admitting that Coleson was its secretary at the time the note was signed, alleges that he signed the same without authority and without consideration, and alleges certain facts amounting to a charge of fraud in the inception of the note. Other matters not necessary to notice at this time are alleged in the answer. The reply, for present purposes, may be said to amount to a general denial.

The following taken from the transcript of the corrected record of the district court shows the subsequent proceedings had in that court, so far as they are material

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at this time: "Now on this 10th day of May, 1905, the plaintiff appearing by its attorney, Thomas H. Matters, and the defendant not appearing in person or by attorney, this case coming on to be heard upon the petition of the plaintiff, the answer of the defendant, and the reply of the plaintiff, and the statement of plaintiff's counsel that the note sued on in this case is in the hands of the clerk, and that there is a certain amount due upon the same, and plaintiff asks for judgment for the plaintiff, and submits the cause to the court; upon consideration whereof the court finds that there is due plaintiff from the defendant, the Sutton Mercantile Company, upon their note herein sued upon the sum of four hundred and fifty dollars (\$450). The court further finds that there is due interest on said note for four hundred and fifty dollars (\$450) at the rate of 10 per cent. per annum from January, 1901, to May 10, 1905, making the sum of six hundred and forty-seven and no one-hundredths dollars (\$647) owing by the defendant Sutton Mercantile Company to the plaintiff to this date." Then follows a formal judgment.

The defendant appeals, contending that error affirmatively appears on the face of the judgment record. This contention seems to be well founded. Where there is an answer on file setting up a valid defense, the fact that defendant fails to appear either in person or by attorney when a cause is reached for trial does not entitle the plaintiff to a judgment without proof of the facts constituting his cause of action, unless the facts admitted by the answer make out a *prima facie* case in his favor. The facts not thus admitted must be established by proof. In *Pultz v. Diossy*, 53 How. Pr. (N. Y.) 270, where the defendant had answered, but failed to appear at the time set for trial, the court said: "The plaintiff, though the defendant failed to appear on the adjourned day, is bound to establish his cause of action by evidence, and if he has not done so the judgment will be reversed." See, also, *Strong v. Comer*, 48 Minn. 66; *McMurtry v. State*, 19 Neb.

147. In the case at bar the petition contains an averment of express authority on the part of the secretary of the defendant to execute the note, and of facts relied upon as estopping the defendant to deny such authority. These averments are put in issue by the answer. The burden of proof, therefore, was upon the plaintiff to show either that the secretary had authority to execute the note or to establish the facts relied upon as an estoppel to deny such authority. As we have seen, the failure of the defendant to appear when the cause was reached for trial did not dispense with proof on these points. True, the judgment purports to have been rendered on the pleadings and a statement made by plaintiff's counsel. That statement was not evidence. That it was not so regarded by the trial court is reasonably clear from the fact that the record recites that the cause was heard on the pleadings and a specific statement of counsel, instead of following the common form and reciting that it was heard on the pleadings and the "evidence." This departure from the common and usual form is significant. Besides, the existence of the note and the amount thereof were not in issue. Counsel's statement, therefore, was not in support of any issue of fact presented for trial.

The presumptions in favor of the records of superior courts are invoked, but such presumptions are of no avail as against facts shown by the record itself. The judgment, then, as before stated, is a judgment on the pleadings. A judgment against the defendant on the pleadings is proper only when the answer contains no denial or averment constituting a defense. *Boldt v. First Nat. Bank*, 59 Neb. 283; *State v. Lincoln Gas Co.*, 38 Neb. 33; *Rourke v. Miller*, 3 Wash. 73; *Widmer v. Martin*, 87 Cal. 88. As at least one valid defense is pleaded in the answer, it follows that the judgment rendered against the defendant on the pleadings is erroneous.

But it is contended that such error is not available to the defendant at this time because no motion for a new trial was filed. A new trial is a reexamination in the

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same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court (code, sec. 314); and a motion for a new trial is a motion for such reexamination. The judgment was rendered without an examination of any of the issues of fact, consequently there could be no reexamination of any such issues, and it would be absurd to hold that the defendant was required to ask what the court could not possibly grant. *Bannard v. Duncan*, 65 Neb. 179. The judgment involved a mere construction of the pleadings, and in such cases no motion for a new trial is required in order to obtain a review in this court. *Scarborough v. Myrick*, 47 Neb. 794; *Hays v. Mercier*, 22 Neb. 656; *Clafin v. American Nat. Bank*, 46 Neb. 887.

The judgment of the district court is clearly erroneous, and we recommend that it be reversed and the cause remanded for further proceedings.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

FARMERS STATE BANK OF SARONVILLE, APPELLEE, v. SUTTON MERCANTILE COMPANY, APPELLANT.

FILED NOVEMBER 22, 1906. No. 14,510.

APPEAL from the district court for Clay county: ROBERT C. ORR, JUDGE. *Reversed.*

Paul E. Boslaugh, John A. Moore and Hall, Woods & Pound, for appellant.

T. H. Matters, contra.

ALBERT, C.

This is a companion case to *First Nat. Bank of Sutton v. Sutton Mercantile Co.*, ante, p. 596. It presents precisely the same questions and requires the same disposition.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded for further proceedings.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

MARGARET C. FOX, APPELLEE, v. LENA FOX, EXECUTRIX,
APPELLANT.

FILED NOVEMBER 22, 1906. No. 14,501.

Trusts: ENFORCEMENT: WITNESSES. A parent divided his property among his sons, who in return agreed to give each of their sisters \$1,500 in cash, the sisters assenting to the plan as an arrangement by which they were to receive their portion of the parent's estate. One son assumed the payment of a sum due the plaintiff, one of the daughters. He died without having paid any portion of the amount agreed upon. *Held, First*, that a constructive trust arose which could be enforced against the estate of the deceased; *second*, that the action to enforce the trust could be maintained by the *cestui que trust* in her own name, although the parent was still living; *third*, that the parent had no such direct legal interest in the result of the action that would disqualify him as a witness in behalf of the plaintiff.

APPEAL from the district court for Butler county:
BENJAMIN F. GOOD, JUDGE. *Affirmed.*

Matt Miller and L. S. Hastings, for appellant.

C. H. Aldrich and L. B. Fuller, contra.

JACKSON, C.

The facts as charged in the petition, and as they were in substance found by the trial court, are that Thomas Fox, with a family consisting of his wife, five daughters and three sons, was residing in Butler county. Two of the daughters were married, a son, Michael, was an adult, the other children were minors. He was possessed of about 800 acres of land and considerable personal property. The son, Michael, was desirous of working for himself, and the father called together the members of his family, and stated, in substance, that he desired in the near future to make a division of his land among his three sons, Michael, William and John; that the sons should pay their sisters the sum of \$1,500 each, or a total of \$7,500, as their share of the estate. This arrangement was assented to by all the members of the family. Michael was furnished with a span of mules, a horse, seed and implements necessary to farm 240 acres of land, which he did, free of rent, for a term of four years. In the fall of 1894 Michael Fox requested his father to assist him in buying 160 acres of land adjoining the 240 acre tract which he was then farming, and stated at that time that he would prefer this assistance in lieu of the arrangement of 1890. Thereupon the father called the three sons together, and the arrangement of 1890 was changed, so that the father provided Michael with \$3,200 in cash and became surety for the further sum of \$2,500. With the cash and credit so obtained Michael bought the 160-acre adjoining farm, and it was then agreed that Michael should pay the plaintiff in this action, at any time after five years that she might desire, the sum of \$1,500 in cash as her share of the father's estate, and \$1,000 to the other sisters. He was also to have rent free the 240-acre tract to farm for an additional period of two years. Later the father divided his lands between the sons, William and John, with the exception of 40 acres which was deeded to one of the daughters. Three of the five daugh-

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ters have received from the sons, William and John, the full amount agreed upon as their share of the estate, one has received the sum of \$500, and the plaintiff nothing. Michael Fox died, leaving a will by which he devised all of his property without making provision for the payment of the \$1,500 to the plaintiff. She filed a bill in equity in the county court, asking that court to decree her the sum of \$1,500 and charge Michael's estate with a trust to that amount. The bill was denied in the county court. Plaintiff appealed to the district court, where the decree was in her favor. The estate, through the executrix, appeals. Thomas Fox is still living, and was the principal witness on behalf of the plaintiff.

The appellant seeks a reversal of the decree for three principal reasons: First, that no trust existed, that the action was one at law, and the defendant was entitled to a jury trial; second, that the plaintiff is not the real party in interest, that the action could not be maintained by her, but was one which should have been brought by the father in his own behalf; and, third, that the father being the party in interest was disqualified as a witness. The two latter contentions may be disposed of together. The transaction, as we view it, amounted to a gift *inter vivos*. It was fully completed by the delivery to the son, Michael, and the arrangement agreed to by the plaintiff as one by which she would receive her portion of the parent's estate. The father could not, therefore, revoke the gift. The subject matter was beyond his control. He was not a party in interest, and the trial court did not err in receiving and considering his evidence.

This brings us to the question of whether or not a trust in fact existed and should be enforced in equity against the estate of Michael Fox. In 2 Story, Equity Jurisprudence (13th ed.), sec. 1244, it is said: "Another class of implied liens or trusts arises where property is conveyed *inter vivos*, or is bequeathed or devised by last will and testament, subject to a charge for the payment of debts or to other charges in favor of third persons. In

such cases, although the charge is treated as between the immediate parties to the original instrument as an express trust in the property, which may be enforced by such parties or their proper representatives, yet as between the trustee and *cestuis que trust* who are to take the benefits of the instrument it constitutes an implied or constructive trust only—a trust raised by courts of equity in their favor, as an interest *in rem* capable of being enforced by them directly by a suit brought in their own names and right.”

The case, in principle, is not unlike that of *Ahrens v. Jones*, 169 N. Y. 555. Jones, in his lifetime, conveyed his property to his wife under an oral agreement that she was to pay his grandchildren the sum of \$2,000. After the death of the husband the wife refused to perform the conditions of the agreement, and it was held that the estate should be impressed with a trust for the payment of the sum agreed upon; that, in fact, the widow became a trustee charged with the payment of that sum, which was declared a lien against the real estate given to the widow. To some extent the same principle was involved in *Pollard v. McKenney*, 69 Neb. 742. In the latter case the husband, being an invalid and in feeble health, expressed his determination to provide by will for a life estate in his widow in the real estate of which he was possessed, and upon her death the fee to vest in his son, subject to a charge of \$2,000 to be paid to his daughters. However, upon the representations of his wife that the expense of administration might be saved by conveying the property to her directly and that she would carry out his intentions, this was done. After the death of the husband the wife retained the title until her own death. Prior to her decease she executed a will, making a disposition of the real estate different from the one intended by the husband. In an action by the son against those claiming under the will, it was held that a constructive trust arose upon the facts stated, and the property involved being real estate, the relief granted was a cancelation of the deed, as no trust

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could be charged against the real estate itself by reason of the statute of frauds. Michael Fox was charged in his lifetime with the execution of the trust accepted by him, and good faith and equity require that his estate should not be relieved from the burden thereof.

The decree of the district court was right, and it is recommended that it be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

CHARLES F. GROTHE, APPELLEE, v. JAMES K. LANE, APPELLANT.

FILED NOVEMBER 22, 1906. No. 14,518.

Contracts: CONSTRUCTION. A contract should be construed to give effect to the intention of the contracting parties, keeping in mind the situation of the parties, the property which is the subject matter of the contract, and the use to which it is being applied.

APPEAL from the district court for Saline county:
LESLIE G. HURD, JUDGE. *Affirmed.*

G. H. Hastings and F. I. Foss, for appellant.

Abbott & Abbott and Ray J. Abbott, contra.

JACKSON, C.

On April 4, 1901, the plaintiff purchased of the defendant a mill property in Saline county consisting of some 45 acres of land, the mill buildings, dam and race. That portion of the description in the deed pertinent to the inquiry is as follows: "Also the right of flowage of said mill-race and of the tail-race of said mill hereinafter

conveyed, and the right to maintain said mill-race and the tail-race thereof as they now stand." It appears from the evidence that the water to operate the mill is taken from a running stream at a distance of a mile or more from the mill and is conducted to the mill by a race. Above the mill had been constructed, along a portion of one side of the race, a dike to prevent the water from overflowing adjacent lands. This dike had been constructed and maintained for some years prior to the time when the defendant became possessed of the property. In the year 1894 or 1895 the defendant constructed an inner dike, not so wide or high as the original one, leaving a space between the two dikes covering a fraction more than an acre of land. The defendant still owns land joining the outer dike. It also appears that prior to the commencement of this action, and after the sale to the plaintiff, the defendant had plowed and cultivated the outer dike, which had the effect to lessen its height and impair its utility as a means of preventing the overflow of water in case of flood or high water. This action was instituted by the plaintiff to obtain an injunction restraining the defendant from interfering with the dike and destroying its usefulness. A temporary injunction was allowed by the county judge. On the trial the temporary injunction was made permanent. The defendant appeals.

The real controversy is as to whether the premises conveyed included the outer dike or whether they were limited to the inner dike. It will be observed from the character of the deed that parol evidence was necessary to establish the boundaries of the mill-race. The evidence introduced on behalf of the plaintiff tends to prove that the boundary of the race, as agreed upon by the plaintiff and defendant at the time of the sale, was the outer dike; that while the water was at its normal stage the inner dike was sufficient to prevent an overflow, but in cases of high water the water would overflow the inner dike but be restrained by the outer dike within the mill-race proper. The evidence also tended to show that, if the water was

permitted to overflow, it would result in damage and possible destruction of the mill property. On behalf of the defendant the evidence tended to prove that the inner dike was agreed upon by the parties as the outer limit of the mill-race, and that the property conveyed extended to or included the inner dike only. It also appears in evidence, without conflict, that at the time the plaintiff purchased the premises the water was at a normal stage and extended only to the inner dike. Upon the conflicting evidence the trial court found for the plaintiff. The witnesses as to the actual contract testified in open court, their credibility was a matter that the trial judge was in a far better position to determine than the appellate court, and we are not disposed to disturb the finding.

It is urged, however, that, because of the fact that when the deed was made the water in the mill-race extended only to the inner dike, the description quoted from the deed must limit the plaintiff's boundary to the outer edge of the water as it then flowed. This contention was determined in the trial court adversely to the defendant, and the construction of the contract adopted was, without doubt, correct. It was plainly the duty of the court to construe the contract in the manner that would give effect to the evident purpose or intention of the contracting parties, keeping in mind the situation of the parties at the time the contract was made, the property which was the subject matter of the contract, the use to which it was being applied, and the probability that it was not the intention of the parties to enter into a contract that would be likely to result in damage or the possible destruction of the property. Plainly the words "as they now stand," appearing in that portion of the deed quoted above, were intended by the parties to apply to the right to maintain the mill-race and the tail-race, and were not intended to limit the right of flowage to the stage at which the water then stood. The outer dike, being necessary to protect the race in times of high water, was as much a

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part of the race as it then stood as the natural bank, where no dike was necessary.

We are satisfied that the conclusion reached by the trial court is correct, and recommend that the judgment be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

UNION PACIFIC RAILROAD COMPANY V. ULRICH FICKENSCHER.

FILED DECEMBER 7, 1906. No. 12,592.

ERROR to the district court for Dawson county: HOMER M. SULLIVAN, JUDGE. *Reversed.*

John N. Baldwin and Edson Rich, for plaintiff in error.

Warrington & Stewart, H. M. Sinclair and Roscoe Pound, contra.

SEDGWICK, C. J.

This action was brought in the district court for Dawson county to recover damages caused by a fire alleged to have originated in the carelessness of the defendant. The case was argued and submitted with the motion for rehearing in the case of *Union P. R. Co. v. Fickenscher*, 74 Neb. 507, and, for the reasons stated in the opinion in that case, the judgment of the district court is reversed and the cause remanded.

REVERSED.

UNION PACIFIC RAILROAD COMPANY V. JOHN FOSBERG.

FILED DECEMBER 7, 1906. No. 13,786.

ERROR to the district court for Dawson county:
CHARLES L. GUTTERSON, JUDGE. *Reversed.*

John N. Baldwin and Edson Rich, for plaintiff in error.

Warrington & Stewart, H. M. Sinclair and George W. Thomas, contra.

SEDGWICK, C. J.

This action was brought in the district court for Dawson county to recover damages caused by a fire alleged to have originated in the carelessness of the defendant. The case was argued and submitted with the motion for rehearing in the case of *Union P. R. Co. v. Fickenscher*, 74 Neb. 507, and, for the reasons stated in the opinion in that case, the judgment of the district court is reversed and the cause remanded.

REVERSED.

STATE, EX REL. ARTHUR V. OFFILL, APPELLEE, v. F. M. HAL-
LOWELL ET AL., APPELLANTS.

FILED DECEMBER 7, 1906. No. 14,571.

Constitutional Law: ELECTIONS: POWER OF COURTS. Section 137 of the "Australian ballot law" (Ann. St., sec. 5775) is not in conflict with the constitution, and confers power upon county courts and upon judges of the district and supreme courts at chambers to summarily review the action of the officer with whom an original certificate of nomination is filed, and to make such order therein as the law requires.

APPEAL from the district court for Buffalo county:
BRUNO O. HONTETLER, JUDGE. *Reversed.*

H. M. Sinclair, for appellants.

Edwin E. Squires, contra.

SEDGWICK, C. J.

Prior to the general election in 1905, the question was raised before the county clerk of Buffalo county whether one Wheelock was entitled to have his name placed upon the official ballot of said county as a candidate for the office of register of deeds to be voted for at the then ensuing election. The decision of the county clerk was that Mr. Wheelock's name should be put upon the ballot. Application was then made to the county court of that county for an order commanding the county clerk to not place upon the official ballot the name of the said Wheelock as candidate. Afterwards such proceedings were had in the matter that a decree was had in the district court for that county by which it was determined that the county court had no jurisdiction or authority in the premises. The object of these proceedings is to reverse that decree of the district court.

The sole question presented in the brief and in the oral argument is whether the law gives the county court

power to hear and determine the question so raised. The statute provides: "All certificates of nomination which are in apparent conformity with the provisions of this act shall be deemed to be valid unless objection thereto shall be duly made in writing within three days after the filing of the same. * * * The officer with whom the original certificate was filed, shall in the first instance pass upon the validity of such objection, and his decision shall be final, unless an order shall be made in the matter by a county court, or by a judge of the district court, or by justice of the supreme court at chambers on or before the Wednesday preceding the election. Such order may be made summarily upon application of any party interested, and upon such notice as the court or judge may require." Ann. St., sec. 5775. No brief was filed nor was any argument made at the bar in support of the decision of the district court. It was stated by counsel for the plaintiffs in error that the theory below was that the order referred to in the above quotation from the statute is a writ of mandamus obtained in regular proceedings for that purpose. Such could not have been the intention of the legislature, unless we suppose that the statute also confers upon county courts jurisdiction in mandamus proceedings, a jurisdiction which that court did not possess. The authority is given to a judge of the district court or a justice of the supreme court at chambers, and these judges do not have authority to issue peremptory writs of mandamus when a trial is necessary to determine the existence of facts upon which the right to the writ is based. From the nature of the case proceedings under this statute are summary in character; hence, the provision that "such order may be made summarily upon application of any party interested." There is no apparent reason for supposing that the statute, which in express terms names the court and the judicial officers who may make the order, and provides that it may be made summarily, is invalid, unless it should be found that the authority so given is administrative or ministerial, and

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so could not be exercised by the judicial branch of the state government. That it is a judicial authority was expressly determined in *Porter v. Flick*, 60 Neb. 773. That case involved the right of a new political organization to use the party name which it had adopted. A judge of the district court, at chambers, made an order reversing the decision of the secretary of state, and upon petition in error to this court the order of the district judge was reversed. In the opinion of the court the statute is quoted, and its validity assumed. We think that the statute is valid, and confers power upon the county court and upon the judges of the district and supreme courts to summarily review the action of the officer with whom the original certificate of nomination is filed, and to make such order therein as the law requires.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

SETH TERRY ET AL. V. STATE OF NEBRASKA.

FILED DECEMBER 7, 1906. No. 14,843.

1. **Habeas Corpus.** A habeas corpus proceeding involving the permanent custody of a minor child is a proceeding *in rem*, in which the *res* is the child and its custody.
2. **Courts: JURISDICTION.** Where two courts have concurrent jurisdiction, that which first takes cognizance of the case has the right to retain it to the exclusion of the other; and where property is *in gremio legis*, if it be a court of rightful jurisdiction, no other court can interfere and wrest from it the jurisdiction first obtained.
3. **Contempt.** Where a habeas corpus proceeding commenced in the district court has been prosecuted to final judgment, the institution by one of the parties therein of another action of the same kind, for the determination of the same question in the county court, before fully and fairly complying with such judgment, for the evident purpose of evading its effect and rendering it of no avail, is a contempt of the district court.

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4. ———: DEFENSE. In such a case a disclaimer of intention, disrespect, or design to embarrass the due administration of justice is no defense.
5. ———: EVIDENCE. One who is not shown to have counseled, aided, or abetted such a proceeding, or to have even had knowledge of its commencement, and whose name as a petitioner seems to have been used without authority, cannot be convicted of contempt.

ERROR to the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

R. W. Sabin, F. O. McGirr and Hainer & Smith, for plaintiffs in error.

Roscoe Pound and Hazlett & Jack, contra.

BARNES, J.

The plaintiffs severally prosecute error from a judgment of the district court for Gage county adjudging them in contempt of an order of that court. The facts underlying this controversy are, briefly stated, as follows: One J. Alfred Johnson, a resident of the state of Iowa, commenced a proceeding in habeas corpus in the district court for Gage county against the plaintiffs herein and one Laura Terry to obtain possession of his two minor children. A trial resulted in an order or judgment of that court remanding the custody of one of said children, who was 17 years of age, to the respondents, and awarding the permanent custody of the other, Effie Johnson, who was but seven years of age, to her father, the petitioner. Respondents in said action, the plaintiffs herein, brought the case to this court where on the 5th day of April, 1905, the judgment was affirmed. See *Terry v. Johnson*, 73 Neb. 653. A motion for a rehearing was filed in due time, and was overruled on October 27, 1905. Thereupon the mandate of this court was sent to the district court for Gage county directing the said court to carry out its said judgment and order. The complaint in the present pro-

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ceeding shows: That on the 5th day of January, 1906, said judgment not having been complied with, the said J. Alfred Johnson filed a petition in the district court for an order carrying it into effect and on the 16th day of January, 1906, the respondents filed an answer and showing in support thereof, alleging matter claimed to have transpired since the original judgment, by reason of which it was claimed that J. Alfred Johnson was not a proper person to have the custody of his said daughter; that afterwards the said respondents withdrew their answer and showing, and on the 21st day of March, 1906, applied to the district judge, at chambers, for a suspension of the enforcement of said judgment on the ground that Laura Terry, one of the respondents, was seriously ill, and that compliance with said judgment would endanger her life. The district judge granted a stay of the order pending the recovery of said respondent; and on the 23th day of June, 1906, said respondent having fully recovered, it was agreed in open court that said judgment should be complied with on the 5th day of July, 1906, and an order of the district judge in writing to that effect was given to the respondents.

It further appears from the complaint and the evidence adduced at the trial that J. Alfred Johnson appointed his sister, Mrs. Gussie DeLorie, his agent to receive the child from the respondents; and on the 5th day of July the respondents went through the form of delivering her to the said Gussie DeLorie, but prior to such delivery prepared the papers in a habeas corpus proceeding in the county court, and immediately thereupon caused the papers theretofore prepared to be formally filed. A writ issued, and within a few minutes the sheriff retook possession and custody of the child from the agent of her father who being absent, and represented only by his sister aforesaid, it was found necessary to enter into an arrangement whereby the respondents again obtained the custody and control of said child. On the hearing of the complaint, the foregoing facts together with others having been made

to appear, the district court found, among other things, as follows: "That on July 5, 1906, the defendants, Seth Terry and Menzo Terry, each intending not to obey the judgment and decree of this court that the said Effie Johnson be delivered to her father, caused a writ of habeas corpus to be prepared and sued out in the county court of Gage county, Nebraska, against Mrs. Gussie De Lorie and J. Alfred Johnson, commanding the sheriff of said county to take said Effie Johnson from the care and custody of each. That said defendants then caused a formal delivery of said infant child to be made in pretended compliance with the order of this court, and then immediately caused said writ of habeas corpus so sued out in the county court to be served, and said child retaken from the custody of said Johnson and his sister, Mrs. Gussie DeLorie; that said delivery by the defendants, and each of them, under the order of this court was colorable merely, and not in good faith, and not intended by them, or either of them, to be in compliance with the order of the district court, and each of said acts was done by them, and each of them, with intent to prevent the delivery of said infant child to her father as heretofore ordered, adjudged and directed by this court. The court further finds that subsequently to July 5 the defendant, Seth Terry, caused a proceeding to be instituted in the county court of Gage county, Nebraska, for the appointment of a guardian for said infant child, Effie Johnson, and in this he was aided, counseled and advised by the defendant, Menzo Terry; and the court finds said proceedings were intended by these defendants, and each of them, to further obstruct the due enforcement of the execution of the judgment of this court heretofore entered decreeing the custody of the said Effie Johnson to her father. The court further finds that each of said proceedings on the part of said defendants, Seth Terry and Menzo Terry, if allowed to stand, are well calculated to bring this court and its processes, judgments and decrees into public contempt." It was thereupon ordered and decreed that "the defend-

ants, Seth Terry and Menzo Terry, forthwith dismiss and discontinue the habeas corpus proceedings commenced by them in the county court of Gage county, Nebraska, July 5, 1906, and that the defendants, and each of them, forthwith comply in good faith with the order of this court heretofore issued, and deliver said infant, Effie Johnson, to her father, or his sister for him; and that the defendants, Seth Terry and Menzo Terry, each stand committed to the county jail of Gage county, Nebraska, until said order, judgment and decree in this proceeding is fully and in all respects obeyed."

The plaintiffs herein contend, among other things, that the findings and judgment of the district court are not sustained by the evidence. It is unnecessary to consume time or space in quoting the evidence. It is sufficient to say the record shows that the plaintiffs herein, after litigating the question of the right of the father to the custody and control of his minor child for at least two years, and after having hindered and delayed the execution of the judgment of the district court commanding them to deliver her into the permanent custody of the petitioner, merely made a colorable compliance with the order, and before doing so prepared the papers to procure a writ of habeas corpus from the county court of Gage county in order to recover possession of the child at the very moment of her delivery in pretended compliance with the order of the district court; that they commenced such proceeding, caused the writ to be issued and served, and thus attempted to render the judgment of no avail whatever. It is also clear that there was no excuse for such a proceeding, for the evidence fails to show any material change in the conditions existing at the time the order was made, and the only purpose of the proceeding complained of was to defeat and nullify such order of the district court. So we are of opinion that the evidence fully sustains the findings and judgment complained of, and justified the conclusion of the trial court.

It is further contended that the facts found by the court

are not sufficient to constitute a contempt, because the writ of habeas corpus is a writ of right; that the judgment in one court on an application for the writ is not *res judicata* of another application before a different court; that plaintiffs had the right to institute the proceeding for the writ before the county court on the 5th day of July, 1906. These statements may be taken as true, and yet the plaintiffs may be guilty of contempt. It is a well-settled rule that where one court of competent jurisdiction in a proceeding *in rem* obtains jurisdiction of the *res*, or, in other words, the thing in controversy, no other court can acquire jurisdiction over it. "It is a rule well known to the profession that where two courts have concurrent jurisdiction, that which first takes cognizance of the case has the right to retain it to the exclusion of the other; that where property is *in gremio legis*, if it be a court of rightful jurisdiction, no other court can interfere and wrest from it the jurisdiction first obtained." *Ryan v. Donley*, 69 Neb. 623. A proceeding involving the custody of a minor child is a proceeding *in rem*, in which the *res* is the custody of the child. *Richards v. Collins*, 45 N. J. Eq. 283. It follows that, until the order or judgment of the district court had been fully and substantially performed by putting the custody of the child permanently where that court had ordered it, the jurisdiction of that court continued; and a new proceeding brought in another court was an interference with the order and judgment of the district court and its custody of the minor child, Effie Johnson. Such interference before the jurisdiction of that court was at an end was a contempt of court. *In re Chiles*, 22 Wall. (U. S.) 157; *Stateler v. California Nat. Bank*, 77 Fed. 43; *In re Tift*, 11 Fed. 463; *Hines v. Hobbs*, 2 Am. Rep. 581.

Plaintiffs further contend that in any event they were not guilty of contempt, because the proceeding in question was not commenced with any such intention. While intention is sometimes a necessary ingredient of the offense, yet there are many cases where the act done

constitutes a contempt of court irrespective of the question of intention. "Disclaimer of intentional disrespect or design to embarrass the due administration of justice is, as a rule, no excuse, especially where the facts constituting the contempt are admitted or where a contempt is clearly apparent from the circumstances surrounding the commission of the act." 9 Cyc. 25; *People v. Wilson*, 64 Ill. 195; *In re Chadwick*, 109 Mich. 588; *Wilcox Silver Plate Co. v. Schimmel*, 59 Mich. 524. In the case last cited the defendants were restrained from selling certain property under a chattel mortgage. The solicitor, Stephen H. Clink, for the defendant, Lewis Schimmel, filed a motion to dissolve the injunction, which was overruled, and thereafter he sold the property in question as the agent of one William Schimmel. He was attached for contempt, and his defense was that in making the sale he did not act as the attorney, agent or solicitor of the defendants, or either of them, but as the agent of William Schimmel, whom he claimed was at all times the owner of the mortgage in question; that the defendant, Lewis Schimmel, was at all times acting for William, and took no title or interest by virtue of a formal assignment of the mortgage to him; that in making such sale he had no intention to commit a contempt. He was found guilty, and it was held that his acts constituted a contempt without regard to his intentions in the matter. It was further said in the opinion: "Injunctions, issued by courts of competent jurisdiction, must be fairly and honestly obeyed, and it would be unbecoming the dignity and self-respect of the court if it should permit them to be evaded by mere subterfuges or tricks." So it seems clear that the intention with which the proceeding in question was commenced is not material, and lack of intention to commit a contempt is no defense herein.

It is also urged that, because this action was dismissed as to Laura Terry, the plaintiffs must also be discharged. This does not follow. It seems clear that she did not commence the proceeding in question, was not present when it

was commenced, and there is no evidence in the record showing that she counseled, aided or abetted its commencement, or that she even knew anything about the matter. It seems clear, therefore, that her name was used by the plaintiffs as one of the petitioners without her knowledge or consent, and she was rightly found not guilty and discharged from any liability herein.

Lastly, it is insisted that, because Laura Terry was one of the petitioners in the habeas corpus proceeding before the county court, the plaintiffs cannot dismiss that proceeding as to her, and for that reason the order should be set aside, and they should be discharged from custody herein. It is a sufficient answer to this contention to say that, if they used the name of Laura Terry in commencing the habeas corpus proceeding upon their own responsibility, and without her knowledge or consent, they cannot be heard to object to the order of the court until they have themselves complied therewith as far as they are able.

After a careful examination of the whole record, we are of opinion that it contains no reversible error, and the judgment of the district court is therefore

AFFIRMED.

JOSEPH E. COBBEY V. STATE JOURNAL COMPANY ET AL.*

FILED DECEMBER 7, 1906. No. 14,122.

Corporations: PROCESS. Section 65 of the code applies to corporations as well as individuals, and, if an action is rightly brought in one county, summons may be issued to another county for service upon a corporation.

ERROR to the district court for Gage county: ALBERT H. BABCOCK, JUDGE. *Reversed.*

* Rehearing allowed. See opinion, p. 626, *post*.

L. M. Pemberton and Hazlett & Jack, for plaintiff in error.

Hall, Woods & Pound, contra.

LETTON, J.

The plaintiff in error brought this action in the district court for Gage county against the defendants in error, jointly, to recover damages for an alleged unlawful conspiracy by them for the malicious prosecution of an injunction suit. The defendant Stonebraker was the only defendant served with summons in that county, but a summons was issued to Lancaster county and served therein upon the other defendants. These defendants, the State Journal Company and the Nebraska State Journal Association, are corporations organized under the laws of this state, each having its principal place of business in Lancaster county and having no place of business in Gage county. The corporations appeared separately and objected to the jurisdiction of the court over their persons. The objections were sustained, and the suit dismissed as to them. The plaintiff seeks by this proceeding to review the judgment of dismissal.

The question for determination is whether, when an action is rightly brought in any county, a summons may be issued to another county and served upon a domestic corporation, or whether the provisions of section 55 of the code are exclusive as to the venue of actions against domestic corporations, whether sued alone or jointly. Section 55 is as follows: "An action other than one of those mentioned in the first three sections of this title, against a corporation created by the laws of this state, may be brought in the county in which it is situated, or has its principal office or place of business; but if such corporation be an insurance company, the action may be brought in the county where the cause of action, or some part thereof, arose." "The first three sections" referred

to have reference to real estate. Sections 54, 56, 57, 58 and 59 refer to actions for specific causes and against specific individuals and corporations, the provisions of none of these sections having reference to an action of the nature of this one. Section 60 provides: "Every other action must be brought in the county in which the defendant, or some one of the defendants resides, or may be summoned." All of these sections from 51 to 60 inclusive are found under title IV of the code, referring to "the county in which actions are to be brought." Section 65, found under title V, which is entitled "Commencement of a Civil Action," is as follows: "Where the action is rightly brought in any county, according to the provisions of title IV, a summons shall be issued to any other county, against any one or more of the defendants, at the plaintiff's request."

Plaintiff in error contends that this action, having been rightly brought in Gage county against the defendant Stonebraker, a summons was properly issued from that county to Lancaster county for service upon the other defendants; while defendants in error insist that under section 55 no jurisdiction in such an action as this can be had over a domestic corporation, other than insurance companies, in a county other than that in which it is situated or has its principal office or place of business. Section 15, art. III of the constitution, provides: "The legislature shall not pass local or special laws in any of the following cases, that is to say: * * * granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever." Section 3, art. XIb, provides: "All corporations may sue and be sued in like cases as natural persons." Section 4117, Ann. St., provides that corporations may have power "to sue and be sued, to complain and defend in courts of law and equity"; and it has been held that the general provisions of the code authorizing a confession of judgment by any person are by reason of these provisions applicable to corporations. *Solomon v. Schneider*,

56 Neb. 680. It seems apparent that the purpose of the makers of the organic law and of the legislature was to confer no greater or higher privileges upon corporations, with respect to immunity from suit than are conferred upon natural persons, and that in the eye of the law a corporation is regarded, so far as liability to sue and be sued is concerned, the same as an ordinary individual. 10 Cyc. 1333. So that, in proceeding to the consideration of the various sections of the statute bearing upon the question, that construction should be given which, without imposing undue burdens upon domestic corporations, would most nearly assimilate their condition, in respect to liability to suit, to that of natural persons. It may be well to notice in this connection that this is the first time this question has been presented to the court for consideration, and that it has not been an uncommon practice for actions to be brought against individuals and corporations, service to be had upon the individual, and a summons sent to another county for the corporation. This practice of itself, of course, would constitute no reason for setting aside a plain statutory provision, but, in a matter as to which the statute is ambiguous and requires construction, the fact of acquiescence by the profession in the practice for many years is worthy of consideration. In construing statutes, all provisions bearing upon the same subject should be taken together and the intention of the legislature determined from a comprehensive survey of the whole, rather than by passing upon isolated sections. The position of defendants in error is, in effect, that the word "may" in section 55 means "must," that the section should read that an action other than one of those mentioned in the first three sections of this title, against a corporation created by the laws of this state, other than an insurance company, *must* be brought in the county in which it is situated, or has its principal office or place of business, and they take the position that, in an action other than those provided for in sections 51, 52 and 53 of the code, no jurisdiction is obtained over a

domestic corporation, not an insurance company, in a county in which it neither is situated nor has its principal office or place of business, by issuance of summons to another county where it has its principal office or place of business, and service there.

This action is for a joint tort, in which one of the defendants was properly served in Gage county. The action, then, was rightly brought as to him in that county, and if the other defendants had been individuals there is no question but that they might have been summoned in any other county in which they might have been found, and jurisdiction thereby obtained over their persons. Does the fact that they are domestic corporations alter the case? In *Adair County Bank v. Forrey*, 74 Neb. 811, we construed section 59 of the code, which is in terms equally as exclusive as to actions against nonresidents of this state as section 55 is with reference to corporations. It provides that an action other than one of those mentioned in the first three sections of this title, against a nonresident of this state, may be brought in any county in which there may be property or debts owing to said defendant, or where said defendant may be found, and it was strenuously urged, upon the same grounds as urged by the defendants in error in this case, that this section was exclusive, that it related to venue, and that an action could not be brought in one county and a summons sent to another for service upon a nonresident, so as to confer jurisdiction upon the court of the first county. In that case it is said:

"Under section 59, title IV, relating to venue, the proper venue of the action was in Douglas county. The provisions of title V do not apply to venue, but provide for the manner in which actions may be commenced, and section 65 provides for the place where summons may be served when an action has been rightly brought under the provisions of title IV. It is an imperative rule of construction that effect be given, if possible, to every portion of a statute. To adopt one construction would eliminate

section 65 entirely, while the other construction gives effect to both sections. Further than this, the construction contended for by defendant in error would necessitate a multiplicity of actions in a case where nonresident defendants were numerous, if service might be had upon them in different counties within this state, whereas, by the other construction, one action only would be required, though they might be summoned in different counties. These sections must be construed together, and, where an action has rightly been brought in one county, a summons may be issued to any other county in the state, and served upon any person personally present therein, whether resident or nonresident. If a person is personally present within the confines of the state, it makes no difference whether he is a resident or nonresident, so far as his liability to personal service of summons is concerned. A nonresident has no greater privilege in that regard than a resident of the state."

Recently this identical question has been presented to the courts of Ohio, but apparently has not yet reached the court of last resort in that state. In *Baltimore & O. R. Co. v. McPeck*, 16 Ohio C. C. 87, the facts were that two railroad companies objected to the jurisdiction upon like grounds as in this case. The court held that the venue against one of the companies was properly laid in the county where the suit was begun, and that, since the petition averred a joint liability, the other defendant was properly brought into court under the provisions of the section of their code which is the same as our section 65. Two later cases arose in that state—*Stanton v. Enquirer Co.*, 7 Ohio N. P. 589; *Baldwin v. Wilson*, 7 Ohio N. P. 506. It is pointed out by the Ohio court that there are no special provisions governing the venue for actions brought jointly against two or more corporations, or against a corporation and individuals jointly, in the sections preceding section 60, and therefore such actions are embraced within the class denominated "other" actions in this section, and that, if the construction contended for by

the defendant in error is correct, then there are absolutely no provisions whereby a corporation and an individual can be sued together in a county outside of the residence of the corporation, nor can a suit ever be maintained against two corporations jointly, if they are residents of different counties, and, if this was intended, then it can be said that corporations enjoy immunities not granted to them, and that a citizen is not protected in his right to enforce a claim against a corporation as he is against a natural person under the law of the state. See, also, *Newberry v. Arkansas, K. & C. R. Co.*, 52 Kan. 613. In *Nebraska Mutual Hail Ins. Co. v. Meyers*, 66 Neb. 657, opinion by Mr. Commissioner AMES, it is said, after stating that title IV applies alone to venue:

"Section 60 alone, among all the provisions of this title, treats of transitory actions, and permits the venue in such cases to be laid in any county in which the defendant, or one of several defendants, resides or may be summoned." And, after quoting section 65, he proceeds: "We think an erroneous impression as to the force of this section has prevailed, to some extent, among members of the bar. It is not confined in its operation, as some have seemed to suppose, to transitory actions, in which at least one of the defendants has been properly served with process in the county in which the action is brought, but, as its language expresses, applies to all actions, local as well as transitory, which are 'rightly brought in any county.'"

While certain expressions in *Western Travelers Accident Ass'n v. Taylor*, 62 Neb. 783, may be taken to be inconsistent with these views, a consideration of the question actually decided therein will show no conflict. In that case it is held that a domestic insurance company may be sued either in the county where its principal place of business is fixed by its charter, although its actual business is carried on and its offices are in another county, or in the county where it is situated and maintains a

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place of business, or in any county where the cause or some part thereof arose. In that case the defendant was a mutual insurance company located at Grand Island. The cause of action arose in Iowa. The only service had was upon its secretary while temporarily in Douglas county, where the company had no agency and no place of business, and the court held that such a service did not confer jurisdiction upon the corporation. This was an action against the corporation alone, and it is very clear that the service attempted to be upheld was not justified by any provisions of the statute.

We are of the opinion that a proper regard for the legislative intent requires that the provisions of all these sections should be construed together; that the intention was to make it possible to bring a joint action against several defendants in a county in which one might be found, and thus prevent a number of suits for the same cause; that it was not the intention of the legislature to treat domestic corporations, when defendants in joint actions, in any other or different manner than natural persons; and that, if the venue was properly laid in Gage county against one of the defendants, a summons may properly issue from that county to any other county in the state, to be served in the manner provided by law for service upon either corporations or individuals.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

The following opinion on rehearing was filed July 12, 1907. *Former judgment of this court reversed and judgment of district court affirmed:*

1. **Malicious Prosecution.** An action for the malicious prosecution of a civil suit cannot be maintained if there was probable cause for bringing the suit complained of.
2. ———. Both malice and probable cause must exist in order to justify an action for malicious prosecution.

3. ———: PROBABLE CAUSE: EVIDENCE. A judgment in a civil suit or a conviction in a criminal suit by a court of competent jurisdiction is *prima facie* evidence of the existence of probable cause, but this is a rule of evidence, and is subject to rebuttal by proof that no probable cause in fact existed.
4. ———. Where the question at issue was whether or not a statute was void as being in conflict with the constitution, the judgment of the district court to the effect that the statute was void constitutes *prima facie* evidence of the existence of probable cause, under the rule laid down in *Nehr v. Dobbs*, 47 Neb. 863; but, since in such a case the ultimate question of whether probable cause existed depends upon a construction of the law by this court, it is determined that the circumstances were sufficient to justify the bringing of the suit and that probable cause existed.
5. Petition examined, and held not to state a cause of action against the defendants for maliciously combining and conspiring together to injure the plaintiff's business. LERTON, J., dissents, as to this proposition.

BARNES, J.

At the former hearing of this case, the only point considered was the objection to the jurisdiction of the district court on the ground that the service could not be made upon a domestic corporation in a county other than that in which it was situated and had its principal place of business. Another objection was presented, but not orally argued, which was that the petition did not state a cause of action against Stonebraker, the sole defendant served in Gage county; that the court acquired no jurisdiction against him, and therefore acquired no jurisdiction of the defendants who were served in Lancaster county. The action was brought against Orville M. Stonebraker, Charles D. Traphagen, Hiland H. Wheeler, the State Journal Company and the Nebraska State Journal Association. The petition charges that the two corporation defendants are engaged in the publication of a daily and weekly newspaper, called the "Nebraska State Journal"; that the defendants Stonebraker and Traphagen are employed by said corporations and financially interested in each of them; that the corporations are both en-

gaged in the publication and sale of a compilation of the statutes of Nebraska made by the defendant Wheeler, who is also interested with the other defendants in the sale of that book, and the acts committed by the defendants, jointly and severally, were done for the purpose of promoting the sale of said book. The petition further alleges that the plaintiff is engaged in compiling and publishing annotated statutes of Nebraska; that he was authorized by the legislature of 1903 to prepare a statute of the state, and that 500 sets of such statutes, of two volumes each, were to be delivered, as soon as published, to the secretary of state, to be distributed to the members of the legislature and state officers, at the price of \$9 a set; that, when said statutes were nearly completed, and for the purpose of hindering and delaying the plaintiff in the publication of said statutes, and of discrediting the said statutes of the plaintiff in the eyes of the public, and of thereby hindering and preventing the sale of the plaintiff's statutes, when published, and to prevent advance sales of said statutes, and for the enhancement of the sales of the said "Compiled Statutes of Nebraska" published by the defendants, the defendant Stonebraker, at the instigation and connivance of the other defendants, commenced an action against the secretary of state to enjoin him from accepting and receiving the 500 sets of statutes sold to the state, and against the auditor of public accounts to enjoin him from issuing a warrant to pay for the same, alleging that the act which authorized such purchase was unconstitutional, well knowing that this was not the case, and that the State Journal Company had sold thousands of copies of statutes to the state under like circumstances; that a temporary injunction was granted by the district court, which, on a final hearing, was made permanent, and a judgment therein was rendered against this plaintiff; that on appeal to the supreme court the judgment of the district court was reversed, and the case was dismissed. The petition further charges that the defendant published in the "State Jour-

nal" numerous articles in praise of their compiled statutes, and reflecting upon the plaintiff and the work done in the preparation of his annotated statutes, and that the sales of his statutes have been largely decreased thereby; that by reason of the acts of the defendants the publication of plaintiff's statutes was delayed, and that he was obliged to pay interest upon the money which he borrowed to enable him to publish the books, and was obliged to pay premiums for insurance upon the books prepared for delivery, and that he was put to great expense in looking after the action and trying to secure its dismissal; that he lost the sale of a large number of statutes by reason of the defendant's conduct; all to his damage in the sum of \$5,000.

Stonebraker's objection to the jurisdiction of the court is, in effect, a demurrer to the petition, and will be so considered. At the outset, we are met by a sharp controversy between the parties as to the nature of the cause of action. The plaintiff contends that the action is one to recover for the malicious prosecution of a civil suit and for a conspiracy to injure the plaintiff's business by publishing false and malicious statements concerning plaintiff's statutes in a newspaper controlled by the defendants; while the defendants insist that the action is one to recover damages for the malicious prosecution of a civil action only. Since both parties agree that the action is, in part at least, one for the malicious prosecution of a civil suit, we will first determine whether the petition is sufficient to sustain such an action. We assume, but do not decide, that an action for the malicious prosecution of a civil suit may be brought by a person, not a party to the suit, but whose property or business was affected by the proceeding; and it is no longer an open question in this state that an action may be maintained for the malicious prosecution of a civil suit, even where there has been no restraint of the person or seizure of property. *McCormick Harvesting Machine Co. v. Willan*, 63 Neb. 391. It is also equally well settled that the essential

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grounds upon which such an action rests are malice and want of probable cause, and both of these elements must be established by the plaintiff. *Turner v. O'Brien*, 5 Neb. 542; *Vennum v. Huston*, 38 Neb. 293; *Hagelund v. Murphy*, 54 Neb. 545. In an action for the malicious prosecution of a civil suit it is necessary to prove want of probable cause, malice and actual damage to the plaintiff resulting from the maintenance of the suit. *Parmer v. Keith*, 16 Neb. 91; *Jones v. Fruin*, 26 Neb. 76.

The facts pleaded in the petition show that the injunction suit was prosecuted to final determination in the district court by the defendant, Stonebraker. A temporary injunction was obtained, which was afterwards made permanent, and a final judgment was rendered by that court in his favor. Under the rule of the older cases such a judgment, rendered by a court of competent jurisdiction after a full consideration of the case, would be held to be conclusive evidence of the existence of probable cause for the institution of the suit; but the later cases hold mainly to the doctrine that, though in a criminal case there has been a conviction or in a civil case a judgment in favor of the plaintiff, yet the presumption that probable cause existed, based upon the fact of the adjudication, may be rebutted by proof that the judgment had been procured by fraud, perjury or other undue means upon the part of the defendant. *Nehr v. Dobbs*, 47 Neb. 863. The plaintiff in that case was convicted of having maliciously and unlawfully killed a certain dog belonging to Dobbs. Upon error to this court the judgment was reversed and the cause ordered dismissed. The conviction in that case, as also the judgment in the injunction suit in question in this case, was the result of a mistake of law upon the part of the district court, but there is a distinction in the cases which is a very material and important one. In the *Nehr* case, Dobbs was aware that his dog had no collar, and the statutes expressly provided: "It shall be lawful for any person to kill any dog found running at large on whose neck there is no collar as aforesaid, and no action shall be

maintained for such killing." Comp. St. ch. 4, art. I, sec. 20. The question before the trial court in that case was a mixed one of law and fact; while in the injunction suit in question herein there was no question of fact involved. the matter presented for determination was simply whether the law authorizing the purchase of the statutes was unconstitutional. This was purely a question of law, upon which the best legal minds might reasonably differ, and we are convinced from a consideration of the legal question involved, that there was room for an honest belief on the part of a reasonable man that the law authorizing the purchase of the statutes from the plaintiff herein was unconstitutional, and therefore there existed probable cause for the bringing of the injunction suit. The plaintiff argues, however, that there cannot be probable cause when the action is groundless, and the motive prompting the bringing of the action is bad or malicious. He concedes that defendant Stonebraker had a right to apply to the court for the *bona fide* purpose of settling the question of the constitutionality of the law, but asserts that, if he did not honestly believe that the law was unconstitutional, and did not bring the suit solely for the purpose of settling that question, but for the malicious purpose of injuring the plaintiff, then there was probable cause. This position assumes that the action was groundless, which is the very point in dispute, and, further, it confuses the question of malice with that of want of probable cause. If the defendant had probable cause for bringing the action, his motive was immaterial. If probable cause existed he had a legal right to maintain the action, and ordinarily, when a legal right is exercised, the motive with which it is done cannot and does not make it illegal. Stonebraker had the legal right, as a taxpayer, to enjoin the payment of state money to Cobbey under an unconstitutional statute, and his act in attempting to prevent the unlawful expenditure of state funds was, ostensibly at least, for a laudable purpose. If the suit had been brought by any other taxpayer, there would have been, as we have seen,

probable cause for its prosecution; and the fact that it was brought by Stonebraker who, it is alleged, acted from an evil motive, does not make that unlawful in him which was lawful if done by another.

Experience shows that, perhaps in a majority of the cases where taxpayers have sought to prevent the expenditure of public funds, pure philanthropy and an unselfish public spirit was not the sole motive which prompted the act, and no court, so far as we are aware, has ever dismissed such a case for the reason that the plaintiff's motives were not entirely altruistic and disinterested. If this might be done, the time of the courts would be taken up in attempting to ascertain the hidden motives of the parties, rather than the real merits of the controversy between them. *Jacobson v. Boening*, 48 Neb. 80; *Letts v. Kessler*, 54 Ohio St. 73; 1 Cyc. 669. In *Stewart v. Sonneborn*, 98 U. S. 187, it is said that it is well established that, unless malice and want of probable cause concur, no damages can be recovered. However blameworthy the prosecutor's motives, he cannot be cast in damages if there was probable cause for the complaint he made. The allegations of the petition that Stonebraker's motives in bringing the injunction suit were to prevent the sale of Cobbey's Statutes, and enhance the sale of a rival publication in which he was interested, tended to show that the action was begun with intent to injure the plaintiff herein without just cause or excuse, and, hence, would be malicious; but, since both malice and want of probable cause must exist, and one of these essential elements is lacking, the petition is defective and fails to state a cause of action against him for malicious prosecution.

The plaintiff claims, however, that the petition states a cause of action against the defendants for combining and conspiring to injure and destroy his business and prevent competition in the manufacture and sale of the statutes of this state. As we have seen, the petition charges that the defendant corporations, who are owners of a newspaper, are jointly interested with the defendants

Stonebraker, Traphagen and Wheeler in the publication and sale of a compilation of the statutes of Nebraska, known as the "Compiled Statutes," and that in pursuance of a combination and conspiracy between them they brought an action to restrain the purchase by the state of Nebraska of 500 sets of statutes from the plaintiff for the sum of \$1,500; that the defendants had failed in having the legislature appropriate money for the purpose of purchasing the Compiled Statutes, as had been done by former legislatures; and that, after the plaintiff had expended large sums of money in the preparation of the manuscript and the printing of his statutes, they began this action for the purpose of hindering and delaying the plaintiff in the publication thereof, discrediting the same in the eyes of the public, preventing its sale, and in order to enhance the sales of the Compiled Statutes. It was further charged that, for the purpose of bringing the plaintiff's statutes into discredit and disrepute among the attorneys and people of the state, the defendants published and caused to be published in the Nebraska State Journal numerous articles, under glaring headlines, reflecting on the plaintiff and his work done in the preparation of his said statutes, an article alleging that said statutes prepared by the plaintiff were not authorized by the legislature, and said act was passed by the legislature in order that the individual members thereof might get statutes for nothing, and wrongfully published and advertised that their Compiled Statutes was the authorized compilation of the statutes of the state of Nebraska, thus representing to intending purchasers that plaintiff had been enjoined from publishing his statutes, and it could not and would not be published and orders given for plaintiff's statutes could not and would not be filled; that by reason of said acts the sale of plaintiff's statutes has been largely discredited, and in a great measure prevented, and the defendants have thereby largely increased the sale of said Compiled Statutes of Nebraska published by them.

The petition, in effect, charges a combination by the defendants to injure the plaintiff's business by bringing a vexatious suit and preventing the sale of a large number of copies of his statutes, and by slandering his work and circulating false statements as to the value, authority and usefulness thereof. It will be observed, however, that all of the matter above set out is pleaded by way of inducement, or by way of aggravation in order to increase the plaintiff's damages, which he alleges he has sustained by reason of the alleged malicious prosecution of the civil suit. And it seems clear, if we eliminate that cause of action, the matters so pleaded by way of inducement and aggravation fall of their own weight, and are not sufficient to constitute a cause of action for conspiracy.

Again, in order to state a cause of action for conspiracy to injure the plaintiff's business, there must be in connection with, and in addition to, the foregoing general statement, allegations or statements of facts from which, if established, the law will imply such a conspiracy or combination. The defendants were together engaged in preparing and publishing a rival statute. This, of course, of itself was not unlawful. It was the very thing that the law encourages as competition in business, and if the combination and conspiracy of the defendants was to publish a more acceptable statute than that published by the plaintiff, and so supply the demand, such an agreement and conspiracy, instead of being unlawful, would be in every way lawful and commendable. Therefore, in order to state a cause of action against the defendants, it was necessary to allege some overt act on their part intended to injure the plaintiff's business, and not reasonably appropriate and adapted to legitimately building up their own business. The fact that the defendants had failed in having the legislature appropriate money for the purpose of purchasing their statutes, and that the plaintiff had expended large sums of money in the preparation of manuscripts and the printing of his statutes, would not of

course, justify the charge against the defendants that they began the action complained of for the purpose of hindering and delaying the plaintiff in the publication of his statutes, or for the purpose of discrediting his statutes in the eyes of the public, and preventing its sale in order to enhance the sale of the Compiled Statutes.

The first overt act charged against the defendants is that, for the purpose of bringing plaintiff's statutes into discredit and disrepute among the attorneys and people of the state, the defendants published, and caused to be published, in the Nebraska State Journal numerous articles, under glaring headlines, reflecting upon this plaintiff and his work done in the preparation of his statutes. This is not an allegation of any wrong done on the part of the defendants. If they published true statements in regard to the quality of their statutes and of the plaintiff's work done in the preparation of his statutes, and did so for the purpose of enhancing the sales of their statutes by giving correct information in regard to the value of their respective works to the purchaser, then their action would be commendable, and certainly would be legitimate as a means of increasing their business.

The second overt act alleged is that the legislature was moved by unworthy motives to pass the act authorizing the purchase of plaintiff's statutes. The plaintiff construes this to be a charge of bribery against himself, and, if such construction is correct, it would reflect upon his character generally, and thus might indirectly injure the sale of his statutes. This allegation would be appropriate in an action for libel in which the plaintiff was seeking to recover damages for injury to his reputation, but such injury to the business of publishing his statutes as might be caused by such insinuation against him is too remote to be capable of being estimated with such accuracy as to form the basis of a judgment for damages.

Again, the publishing of such a statement was equally consistent with the honest belief in its truth and a justifiable desire on the part of the defendants to promote their

own business. The representation that the plaintiff had been enjoined from publishing his statutes was based upon the fact that the purchase of his statutes by the state had been enjoined, which was literally true, and there was just ground to suppose, at that time, that the injunction would be made perpetual. So far as anything alleged in the petition shows, the defendants might well believe that the plaintiff's statutes could not be, and would not be, published, and that orders given therefor would not be filled. So that this statement furnished no indication that the defendants were conspiring to maliciously injure the plaintiff's business. On the other hand, they were entirely consistent with the just desire to promote their own business by legitimate means.

As above stated, the gist of this action was to recover damages from the defendant for the malicious prosecution of a civil action. This supposed cause of action having failed, the court ought not to find that another and different cause of action was alleged in the petition, because of fugitive statements, appropriate, as they were, to the main cause of action, unless those statements contain such allegations of fact as to clearly present a legal ground for the recovery of damages. The general rule is that the allegations of a pleading are to be taken most strongly against the pleader. This is a wholesome and necessary rule. One who states a cause of action or defense is supposed to state all of the facts that are favorable to his claim, and state them in the most favorable light. Nothing, therefore, ought to be taken in his favor by implication; and, tested by this rule, the petition fails to state a cause of action for a conspiracy. The defendant Stonebraker's objection to the jurisdiction was therefore properly sustained.

For the foregoing reasons, our former judgment is reversed and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

LETTON, J.

The foregoing opinion expresses my ideas upon the question of whether a cause of action is stated for malicious prosecution, but runs counter to my views upon the question whether the petition states a cause of action for malicious injury to business. In effect, the petition charges a combination of the defendants to injure the plaintiff's business by beginning a vexatious suit, by slandering his work and circulating false statements as to the value, authority and usefulness of the plaintiff's compilation of statutes, by stating it would not, and could not, be published, and that they thereby prevented the sale of a large number of the books to intending purchasers. While it is often difficult to draw the line between injuries to business caused by legitimate competition, which are not actionable, and cases in which the means employed to increase one's own business and to interfere with the rights of a competitor, and injure and damage his business, are wrongful and actionable, still it seems to me that the allegations in this petition, while general and not very definite in their nature, if proved, are sufficient to constitute a cause of action.

The necessity of a free field for business enterprise permits of interfering with the business of another by a competitor selling goods at a lower price, or by advertising the merits of a rival's wares and merchandise, or by seeking to add attractiveness and desirability to the goods one sells over those of his business rival, or by praising his own wares and comparing them with those of his competitor to the disadvantage of the latter, and in many other ways, but there is a limit beyond which fair and legitimate competition and business enterprise may not go. A man's goods may be slandered as well as his good name, and where the article which he has to sell derives its special value from the individual skill, experience and qualifications for its compilation of the editor or compiler, or from the fact of its having been authorized to be

used in the courts by the legislature, a serious wrong may be committed by false and damaging statements as to these particulars. In 1 Bacon, Abridgement, "Actions on the Case," p. 119, illustrations are given of actions on the case of a nature similar to this: "If A, being a mason and using to sell stones, is possessed of a certain stone-pit, and B, intending to discredit it, and deprive him of the profits of the said mine, imposes so great threats upon his workmen, and disturbs all comers, threatening to maim and vex them with suits if they buy any stones, so that some desist from working and others from buying, etc., A shall have an *action upon the case* against B, for the profit of his mine is thereby impaired." "If a man discharges guns near my decoy pond with design to damnify me by frightening away the wild fowl resorting thereto, and the wild fowl are thereby frightened away, and I am damnified, an action on the case lies against him." *Carrington v. Taylor*, 11 East, 571. The latter principle was established in the case of *Keeble v. Hickeringill* (11 East, 574, note), where it was said by Lord Holt: "Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 Henry IV, p. 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school and their parents would not let them go thither, sure that schoolmaster might have an action for the loss of his scholars."

In this case the charge is that by the bringing of the

lawsuit and by the use of the false statements in the newspapers of the defendants, the worth of the plaintiff's edition of the statutes was discredited, and attorneys and officers who would have purchased plaintiff's statutes were prevented from so doing by the fear that they were unauthorized and of little value. In a Texas case, *Brown v. American Freehold Land Mortgage Co.*, 97 Tex. 599, 80 S. W. 985, it was charged that the defendants procured a certain loan company for whom the plaintiffs had been agents to take the business agency in Texas away from the plaintiffs by making false and malicious representations as to the management of its business by the plaintiffs, and had prevented their continuing their business with a large number of other clients by publishing false statements and reports that the plaintiffs were insolvent and unable to accommodate their customers, and by other undue means, the petition alleging with great particularity many acts performed by the defendants for the purpose of accomplishing their end. The court held this petition to state a cause of action, and in this connection quoted from *Walker v. Cronin*, 107 Mass. 555, as follows: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from a malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing."

Wildee v. McKee, 111 Pa. St. 335, was an action for conspiracy to defame and injure a person in his business. The plaintiff was a school teacher and it was charged that the defendants, maliciously intending to injure him in his good name, and in his business and profession,

did unlawfully combine and form themselves into a conspiracy to defame, and that they did publish certain scandalous words charging that he was incapacitated for his business on account of insanity and monomania. This was followed by an averment of special damages. The court held that the petition stated a cause of action, reversing the lower court.

In *Smith v. Nippert*, 76 Wis. 86, 44 N. W. 846, the petition charged a malicious conspiracy to injure the plaintiff's business as dressmaker and seamstress by suing out an inquisition of lunacy against her, and by causing it to be believed that she was insane, and not a proper person to be employed in the household where she had formerly found employment. The court held that the petition stated a good cause of action for an injury to the plaintiff's reputation and business. *Farley v. Peebles*, 50 Neb. 723; *Hartnett v. Plumbers' Supply Ass'n*, 169 Mass. 229, 38 L. R. A. 194; *Dolz v. Winfree*, *Norman & Pearson*, 80 Tex. 400, 26 Am. St. Rep. 755; *Van Horn v. Van Horn*, 52 N. J. Law, 284; *Kimball v. Harman* 34 Md. 407; *Buffalo Lubricating Oil Co. v. Everest*, 30 Hun (N.Y.), 587; *Doremus v. Hennissy*, 62 Ill. App. 391, which is an instructive case. See, also, a full discussion of the law upon this subject, as affected by *Allen v. Flood*, L. R. App. Cas. (1898) 1, and *Mogul S. S. Co. v. McGregor*, 23 L. R. Q. B. Div. 598, and L. R. App. Cas. (1892) 25, by the supreme court of Wisconsin in *State v. Huegin*, 110 Wis. 189. In *Quinn v. Leathem*, L. R. App. Cas. (1901) 495, which is a very interesting case, it is pointed out that *Allen v. Flood*, *supra*, has been misunderstood and that the doctrine of the common law as to combinations to injure a man's business has not been changed by that decision, as the Wisconsin court assumes, but is still adhered to by the English courts. See, also, *Temperton v. Russell*, 1 L. R. Q. B. Div. (1893) 715.

The petition alleges facts of a nature which do not constitute lawful competition. It charges the malicious interference with and injury to the plaintiff's business

by reason of malicious acts on the part of the defendant Stonebraker, in combination and conspiracy with the other defendants. The allegations are stated in general terms, are not properly separated from the cause of action for malicious prosecution, but, while lacking in particularity, are not assailed for that reason, and, in my opinion, are sufficient to state a cause of action.

**EMMA STEHR, APPELLEE, v. MASON CITY & FORT DODGE
RAILWAY COMPANY, APPELLANT.**

FILED DECEMBER 7, 1906. No. 14,694.

1. **Eminent Domain: SPECIAL DAMAGES.** Under the constitutional provision that "the property of no person shall be taken or damaged for public use without just compensation therefor," where there has been a disturbance of a right which the owner of real estate possesses in connection with his estate and which gives to it an additional value, by reason of which disturbance he sustains special damages in respect to such property in excess of that sustained by the public at large, he is entitled to recover damages.
2. ———: **DAMAGES.** In such case the damages recoverable properly include all damages arising from the exercise of eminent domain which cause a diminution in the value of the property.
3. ———: **USE OF STREETS: ABUTTING PROPERTY: DAMAGES.** Where an ordinance is passed granting the use of public streets to a railway company for the construction and operation of its road, an abutting property owner cannot be prevented from recovering from the railway company damages to his property caused by the construction of the railway in and across the streets by inserting in such ordinance a provision vacating the portions of the streets to be so used by the railway company.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

A. G. Briggs and W. D. McHugh, for appellant.

Baldrige & De Bord and J. B. Fradenburg, contra.

LETTON, J.

The plaintiff is the owner of the west one-third of lot 3, block 12, Kuntze & Ruth's addition to the city of Omaha, being a strip of ground 48 feet wide and 50 feet long fronting west upon Nineteenth street in that city. The defendant has recently built and put in operation certain railroad tracks and a terminal freight station near the plaintiff's property. The tracks leading from the main line to the terminal station are constructed parallel with Nineteenth street for a distance of about 1,000 feet upon land belonging to the railroad company to a point nearly across the street from plaintiff's property, from thence curving in a northeasterly direction across Nineteenth street and Mason street and extending to the terminal station, which is situated about three blocks east and two blocks north of the plaintiff's property. Directly opposite the property there are four tracks. These tracks are situated in the bottom of a deep cut or excavation which is partly upon the land belonging to the railroad company and partly in Nineteenth street and in Mason street, which intersects Nineteenth street about 50 feet north of the plaintiff's lot. About one-half of the width of Nineteenth street has been cut away in front of the premises. The plaintiff complains that by the construction of these tracks the defendant has largely changed the natural surface of the ground immediately in front of and near her property: that it has cut off the access to the property upon Sixteenth, Seventeenth, Eighteenth and Nineteenth streets, and that she is deprived of ready access to the business part of the city of Omaha and to a schoolhouse which is near by; that her property is residence property; that it has been damaged and will continue to be damaged from jars and concussions caused by passing cars and engines, and that the occupants of the property are and will be annoyed by smoke, cinders and soot and by the noise of whistles, bells and passing trains.

The contention of the defendant railway company is that, since the plaintiff has no property right in the surface of the lot across Nineteenth street upon which the defendant built its railway, the excavation of the lot did not invade any property right which she enjoyed in connection with her property and hence she has no right to recover; that, since a lot owner could excavate, provided he preserved the lateral support of the lot of his neighbor, without being liable for damages, so also could the railway company, and though such excavation might affect the value of the plaintiff's property, still this would be *damnum absque injuria* and no recovery permitted.

The questions at issue are substantially the same as were considered by the court in the case of *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364. In that case, as in this, the tracks were laid upon land belonging to the railway company, and the plaintiff's damage was caused in part by the closing of certain streets and the partial obstruction of others, thus depriving him of convenient ingress and egress to and from his property, and, by the construction and operation of the railway, smoke, soot and dust from the engines were thrown thereon, and, by the ringing of bells, sounding of whistles and noise of trains, the property was damaged and rendered undesirable for residence purposes. Several of the cases cited in that case are again cited by defendant's counsel in this case, with later cases holding the same doctrine. However, after full consideration and exhaustive discussion, the court in the *Hazels* case held that "the words 'or damaged' in section 21, art. I of the constitution, includes all damages arising from the exercise of eminent domain which causes a diminution in the value of private property," and that in arriving at the diminution in the value it is proper to take into consideration all elements of damage caused by such construction which tend to diminish the value of the property. The doctrine of this case was in harmony with *Burlington & M. R. R. Co. v. Reinhackle*, 15 Neb. 279; *Republican Valley R. Co. v.*

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Fellers, 16 Neb. 169; *City of Omaha v. Kramer*, 25 Neb. 489, and *Omaha Belt R. Co. v. McDermott*, 25 Neb. 714, decided previously, and it has been cited and followed in *Omaha & N. P. R. Co. v. Janecek*, 30 Neb. 276; *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240; *Jaynes v. Omaha Street R. Co.*, 53 Neb. 631; *Chicago, R. I. & P. R. Co. v. Sturey*, 55 Neb. 137, and *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb. 90.

The defendant quotes and relies on the following language in the opinion in *Gottschalk v. Chicago, B. & Q. R. Co.*, 14 Neb. 550: "The evident object of the amendment was to afford relief in certain cases where, under our former constitution, none could be given. It was to grant relief in cases where there was no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate, by reason of which he sustains special injury in respect to such property in excess of that sustained by the public at large." It further cites and relies on the case of *Rigney v. City of Chicago*, 102 Ill. 64, which is largely quoted in the *Gottschalk* case, and is a leading case upon the subject. The vacation of the streets mentioned, and the cutting down and narrowing of that part of Nineteenth street immediately in front of plaintiff's property, is shown by the testimony to have been a direct injury to the property, by cutting off the plaintiff's means of access by way of Nineteenth street, or the other vacated streets, to the business portion of the city, and by rendering more inconvenient the ingress and egress of others to the property, and is further shown to have directly depreciated the value of the property. She was entitled to the use of the whole of Nineteenth street in front of her property and to the use of that portion thereof north of the center line of Mason street. Further than this, the evidence shows that, on account of the proximity of the railway, smoke and soot is blown upon her property to such an extent as to make the property less desirable as a place of residence, to lessen its value in the

market and to depreciate its rental value. It is not a direct physical injury to the real estate itself, but it is a special injury to the property in excess of that sustained by the public at large, and the owner of the property suffers damage to her right of access and to her right of free and undisturbed enjoyment. The facts in this case bring it within the rule of the *Gottschalk* case, and the rule adopted by this court is substantially the same as that adopted in the *Rigney* case, and which is now applied by the supreme court of Illinois in like cases. See *Pittsburg, Ft. W. & C. R. Co. v. Reich*, 101 Ill. 157; *Chicago, P. & St. L. R. Co. v. Nix*, 137 Ill. 141; *Chicago, M. & St. P. R. Co. v. Darke*, 148 Ill. 226; *Chicago v. Taylor*, 125 U. S. 161.

It appears that the city council of the city of Omaha passed an ordinance granting the use of a portion of certain streets, the obstruction of which is complained of by the plaintiff, to the defendant railway company, for the operation of its road, and vacating the same, and the defendant now contends that, since the streets were vacated prior to its occupancy of them, the plaintiff is not entitled to recover for damages to her right of ingress and egress, the same having been taken away by the vacation before the railroad was built. It appears, however, that the grant of the use of the streets and the attempted vacation were made for the benefit of the defendant, and were made at the same time and by the same ordinance. Under the rule laid down in *Burlington & M. R. R. Co. v. Reinhackle*, 15 Neb. 279, these facts do not in any way militate against the right of the plaintiff to compensation from the defendant for the damages she may have sustained.

The issues presented do not require the enunciation of any new doctrine. The instructions requested by the appellant and refused were properly refused under the facts shown, and the instructions given by the court, when considered in connection with the evidence, were not prejudicial. The question as to the right of the owner of

an abutting lot to damages for the whole or partial closing of a street is differently answered in different states, but the law is settled here. The right to damages is not restricted merely to a recovery for an interference with the right of ingress and egress in front of the property and with the right to light and air, but the owner of such property is entitled to recover for all such damages, direct and consequential, as he may suffer by reason of the interference with his right of property. Where there has been a disturbance of a right which the owner of real estate possesses in connection with his estate and which gives it additional value, by reason of which disturbance he sustains special injury in respect to such property in excess of that sustained by the public at large he is entitled to recover all the damages, both direct and consequential, which may result from such invasion of his property rights. The plaintiff therefore was entitled to recover in this case for both direct and consequential damages.

What has been said disposes of all points raised in the requests for instructions by the appellant, except that in which the court was requested to instruct the jury "not to allow any damages based upon the diminution in the value of her property caused solely by the fact that the railway company, defendant, made the cut and excavation upon its own property west of the property of plaintiff." As to this, it may be said that the instruction does not properly reflect the evidence, since the cut and excavation were not in fact entirely upon the railway company's own property, but also in Nineteenth and Mason streets; and, further, it would be impossible for a jury to separate and distinguish the damage accruing to the property from that part of the excavation on the street and that portion on the company's own premises. The court did not refuse this instruction.

The judgment of the district court is

AFFIRM

STATE OF NEBRASKA, APPELLEE, V. SEVERAL PARCELS OF
LAND, APPELLANT.

FILED DECEMBER 7, 1906. No. 14,482.

Judicial Sales: APPRAISEMENT: ESTOPPEL. A purchaser at a judicial sale, at which certain apparent liens have been duly certified and deducted in the appraisal, is a purchaser subject to such liens, and is estopped, after confirmation without objection, to dispute their validity, and this rule is equally applicable to the judgment plaintiff and to strangers. A stipulation that the supposed liens are in fact void is not, without more, a waiver of the estoppel.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

W. A. Saunders, for appellant.

H. E. Burnam and *W. H. Herdman*, *contra*.

AMES, C.

George M. Grant, as the holder of a mortgage on a certain tract of land in the city of Omaha, procured a decree of foreclosure and sale of the same, and became the purchaser of it at the sale which was consummated by confirmation and deed according to the usual course of procedure in such cases. The appraisers appointed by the sheriff found the gross value of the property to be \$5,280, from which they deducted \$1,024 on account of the apparent tax liens thereon as shown by treasurer's certificates procured by the sheriff pursuant to the statute, and the amount of the bid was \$4,000 or \$250 less than the "net" value of the land as shown by the appraisal, and \$480 more than two-thirds of the amount of the gross appraisal. This is an action in the name of the state to foreclose the supposed tax liens pursuant to the so-called "Scavenger" act of the last legislature. A grantee of the purchaser at the foreclosure sale was made defendant, and answered, denying the validity of the alleged taxes on account of which the foreclosure is sought; and it was

stipulated before the trial that said supposed taxes were and are, in fact, wholly void, but the district court nevertheless entered a decree of foreclosure and sale, from which the defendant appeals.

This court has held so many times and so frequently that "a purchase of property at a judicial sale at which certain liens have been duly certified and deducted in the appraisement is a purchase subject to such liens, and the purchaser will be estopped from questioning their validity in subsequent proceedings, although he may have paid more than two-thirds of the gross appraisement" (*Battelle v. McIntosh*, 62 Neb. 647), that a reiteration of the decision now can serve no useful purpose. See, also, *Omaha Loan & Trust Co. v. City of Omaha*, 71 Neb. 781. Nor is any reason given why the rule thus settled should be inapplicable to cases in which the purchaser is also the judgment plaintiff, because the estoppel operates upon him in his character as purchaser only, and that character is not affected by the other mentioned fact when it exists. But it is argued that the estoppel is waived or discharged by the admission by stipulation that, as a matter of fact, the alleged taxes were and are void. But this stipulation, we think, amounts to no more than a waiver of the production of evidence to prove that fact. It is the fact itself that is rendered by the estoppel incompetent to be received in evidence or considered by the court, and such incompetency the stipulation does not purport to waive or remove, nor, evidently, was it within the intent of the parties that it should do so.

We are of opinion, therefore, that the judgment of the district court is right and recommend that it be affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

PETER LENAGH ET AL., APPELLEES, v. COMMERCIAL UNION
ASSURANCE COMPANY, APPELLANT.

FILED DECEMBER 7, 1906. No. 14,507.

1. **Insurance:** HOUSEHOLD FURNITURE. Husband and wife have each and both a pecuniary and insurable interest in all articles comprised in the furniture of their household, or which are necessary or convenient and actually in use in the maintenance of their domestic relation, regardless of whose money paid for them, or by what means or from what sources they were obtained.
2. ———: **ASSIGNMENT: RIGHTS OF INSURED.** When an insurance company consents in writing to an assignment of a policy of fire insurance without restriction or limitation with reference to the purposes of the assignment or the extent of the interest assigned, which is in fact, as between the parties, less than the absolute or entire interest or rights of the insured under the contract, and when, after a loss has occurred, but before payment has been made, the rights and interests of the insured are brought to the knowledge of the company, they cannot be defeated or impaired by a compromise and settlement and attempted satisfaction between the latter and the assignee without the consent of the insured.
3. ———: **DESIGNATION OF INSURED.** When there is no fraud, accident or mistake as to the description or ownership of property, or articles intended to be covered by a fire insurance policy, and the person intended to be insured and who pays the premium is in fact the owner of the same, or has an insurable interest therein, it is immaterial by what name he is designated in the policy.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

Greene, Breckenridge & Kinsler, for appellant.

Lambert & Winters, contra.

AMES, C.

The plaintiffs, Peter Lenagh and Bridget, his wife, were in possession of a dwelling house, and of certain household furniture situated therein, in the city of Omaha. Who owned the building or whether it was used for any

Lenagh v. Commercial Union Assurance Co.

other purpose than that of a dwelling, we do not know, and is perhaps immaterial. The ultimate ownership of a part of the furniture was, as was testified upon the trial, in the husband, and a part in the wife, and of some minor articles in the children of the family. The property, as is stated in the brief of counsel for the defendant, "consisted of beds, bedding, a carpet, three pairs of shoes, two suits of clothes, two or three dresses belonging to Mrs. Lenagh, three trunks, a fiddle, a sewing machine, 'the kids' clothes, a shotgun, two writing desks, dishes and crockery, some pictures, two stoves and a safe," some of which had been bought with money of the husband, and some with that of the wife.

In 1902, articles of incorporation were prepared and subscribed and filed with the county clerk for an institution to be named the "Star Coal Company," but the instrument was never filed elsewhere, and no capital stock was ever subscribed or paid in, and no certificates of capital ever issued or executed, nor any attempt made at organization, but Lenagh and his wife carried on a business in the proposed corporate name, and in December of that year procured by that name a policy from the defendant insuring the building in the sum of \$1,000, and the furniture in the sum of \$250, against loss or damage by fire. It is not pretended that there was in this transaction any fraud or mistake, or any unlawful intent, or any misdescription or ignorance by either party of the property intended to be covered by the contract of insurance, for which the plaintiffs, or one of them, paid the stipulated premium. Former decisions of this court appear to us to have put the validity of this policy beyond the region of controversy. *Cook v. Westchester Fire Ins. Co.*, 60 Neb. 127; *Farmers & Merchants Ins. Co. v. Mickel*, 72 Neb. 122. Its validity is attempted to be disputed with respect to the personal property only, solely on the ground of the alleged separate and individual ownership of parts of the latter, in consequence of which it is contended that neither the husband nor wife had an insurable interest

in all of it, and the policy stipulated that it should be void if the insured was not the sole and absolute owner of the property covered by it. There is reason and authority for holding that this defense, if otherwise sufficient, was waived by failure to plead it. *Farmers & Merchants Ins. Co. v. Peterson*, 47 Neb. 747. But we are quite clearly of opinion that if it had been pleaded it would have been unavailing. In an overwhelming majority of cases the separate ownership in members of a family of articles comprised in the furniture of a household is a pleasing fiction rather than a reality and the presence of it is a concession to sentiment rather than a representation of fact. To our minds the assertion that husband and wife have not each and both separately and jointly a pecuniary and insurable interest in all such articles, regardless of whose money paid for them, and from what sources or by what means they were obtained, as are necessary or convenient and actually in use in the maintenance of the domestic relation, is palpably absurd. It can only be at or after the dissolution of the family, or when an attempt has been made to transfer or incumber the property, or some of it, that the question of separate ownership or right of possession can have any practical significance. The family is a unit, and those articles of personalty which it possesses, and which are necessary or convenient for the maintenance of the domestic relation, are in a very real, though perhaps not in an absolute sense the property of the institution so long as the latter continues to exist. The fact that the policy named the nonexistent Star Coal Company as the insured is plainly of no significance. It was merely a trade or fictitious name of the parties owning the property and paying the premium, and of none other, and was the occasion of no mistake or injury.

After the issuance of the policy the plaintiff conveyed the building by an instrument in form a deed, but intended as a mortgage, to secure the payment of a debt to one Moriarity and thereupon, with the written consent of

the company, and in compliance with the terms of the policy, assigned the same by the execution of a blank form, printed on the back of it, to the grantee. The assignment was executed in form as by the "Star Coal Company," by "Peter Lenagh, President," and the consent was given to the "Star Coal Company as owner of the property covered by the policy," and the instrument was delivered to the assignee. Afterwards, and during the life of the policy, the building and contents were destroyed by fire. Shortly thereafter the company paid to Moriarity \$1,000, the amount of the insurance on the house, and received from him a receipt: "In full compromise and settlement of all claims and for loss and damage by fire on the 5th day of September, 1904, to property insured under (the policy), and the said policy is hereby canceled and surrendered." It is entirely clear that Moriarity never had any title, lien or interest to, in or upon the personal property, and that his proof of loss was intended to cover and did cover the amount of loss and insurance upon the building only, and that these facts were known to the company at the time of the payment to him and of the execution of the above mentioned receipt. Before that time the plaintiffs had made proof and demanded payment of loss on account of the destruction of the furniture, and the company was fully aware that the assignment to Moriarity was not absolute, but by way of collateral to the mortgage security and indebtedness to the latter. This is an action in equity to reform the assignment so as to show that it was intended by way of security, and not absolute, and to recover for the loss of the personal property. There was a judgment for the plaintiffs from which the defendant appeals.

The defendant contends that there is insufficient ground for the reformation of the assignment because there is no allegation of fraud or of mutual mistake, and because Moriarity, one of the parties to the assignment, is not a party to the action. We think the objection is immaterial, because there is no necessity for the reformation in

question. The assignment, though absolute in form, was intended by the parties to it as security for the payment of a debt, and, as is the case with all such transactions, is treated by the court as having taken effect according to such intent, and not otherwise. The company has no cause for complaint. It has not been misled to its prejudice, and neither the policy nor the assignment contained any restriction as to the purpose or purposes for which the latter could be made, and the company consented without any inquiry in that regard. It is not contended, nor could it be successfully, that the assignment was void and by consequence the policy forfeited and annulled because of the purpose for which the former was made, but, if it is valid, it is so according to the intent of the parties. The court cannot, certainly, make a contract for them which they did not intend or attempt to make for themselves. A case identical with this, in essential particulars, is *Merrill v. Colonial Mutual Fire Ins. Co.*, 169 Mass. 10, in which the same conclusion here reached is fortified by reason and authority not necessary now to be reiterated, but which we adopt as our own.

It follows as a matter of course that Moriarity was without power to compromise, settle or discharge the obligation arising under the policy beyond the extent of his own interest therein, and that the company having had, before the settlement was made, knowledge of the extent of that interest and of the rights of the plaintiffs in the premises, was equally as powerless as was the assignee to prejudice the latter by the transaction.

We are of opinion, therefore, that the judgment of the district court is right and recommend that it be affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

NELLIE BURSON, APPELLEE, V. CHARLES W. PERCY,
APPELLANT.

FILED DECEMBER 7, 1906. No. 14,515.

Evidence examined, and found to support the findings and judgment of the district court.

APPEAL from the district court for Sioux county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

A. W. Crites, for appellant.

D. B. Jenckes and Grant Guthrie, contra.

AMES, C.

There was a small stream of water that was wont to flow through lands of both the plaintiff and defendant, and also through an intermediate tract, the lands of defendant being nearest its source. This is an action to restrain the defendant from diverting and consuming the waters of said stream upon his own land so as to wholly deprive the plaintiff of the use thereof for domestic and agricultural purposes. Although the answer contains a general denial, the sole real defense is that of adverse possession, it being alleged in the answer, and sought to be established by evidence, that the defendant had thus wholly diverted the waters of the stream and enjoyed the exclusive use of them under claim of right and ownership for more than ten years prior to the beginning of the action. A large number of witnesses were sworn and testified, and their testimony is in some respects conflicting. We cannot conceive that any useful purpose would be subserved by setting forth the evidence *in extenso*, or by a comprehensive review and criticism of it in a judicial opinion by the court. The cause was submitted without oral argument, and we do not gather from the briefs of counsel that there was any dispute either as to the suf-

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iciency of the defense, if it is established by the evidence, or as to the character of evidence requisite to that end.

The sole question is as to the preponderance of the evidence upon certain vital points, and mainly as to the length of time during which the admittedly adverse user has been enjoyed. The trial court, who heard the testimony, all of which was given in open court, found that the period was of less than ten years prior to the date of the beginning of the action, and perpetually restrained the defendant from consuming more than two-thirds of the water or diverting more than that portion thereof from the stream at the point of departure of the latter from his lands, with leave, however, to either party to make future application to the court for a modification of the decree with respect to the quantity of water of which the defendant should be permitted to make exclusive appropriation, or which should be permitted to flow over the lands of the plaintiff, for use for domestic and agricultural purposes. This decree, as a consequence of the facts found, appears to us to be in exact harmony with the rule announced by this court in *Meng v. Coffee*, 67 Neb. 500, and, as respects the facts, we think it ought to suffice to say that we have made a careful investigation of them, as disclosed by the record, and have not been led to the opinion that the trial court erred in his conclusion with reference to them.

We therefore recommend that the judgment of the district court be affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

Perry v. Staple.

SAMUEL H. PERRY, APPELLANT, v. WILLIAM L. STAPLE
ET AL., APPELLEES

FILED DECEMBER 7, 1906. No. 14,527.

Evidence examined, and held insufficient to prove an abandonment or adverse occupancy of a public road.

APPEAL from the district court for Antelope county:
JOHN F. BOYD, JUDGE. *Affirmed.*

A. F. Mullen, for appellant.

George F. Boyd, contra.

AMES, C.

The petition alleges in substance that the plaintiff is the owner of a certain tract of land in Antelope county across which the county board of that county located and established a public road in the year 1887, but that more than six years prior to the beginning of this action the public abandoned the road for the use of various trails, drives or pathways across his lands, to protect his property against which he had built fences around the tract. It is further alleged that shortly before the beginning of this action one of the defendants, who is the county surveyor of said county, and the other of them, who is overseer of roads for the district in which said land lies, had proceeded, under the direction and authority of the county board, definitely to ascertain the line and location of said abandoned road, and to cut and destroy the fences of the plaintiff so far as they obstruct travel thereon. The plaintiff avers that he and his predecessors in title are, and have been for more than ten years last past, the owners and in the exclusive possession of the tract of land over and upon which said road was located, and for more than six years prior to the beginning of the action have been in the open, notorious, exclusive and

adverse possession of the particular strip of ground upon which the road lies, claiming to be owners thereof free from any interest therein or easement thereupon by the public by reason of said road, or otherwise, and that the conduct of the defendants, actual and threatened, is and will be of irreparable injury to him, which cannot be adequately compensated in an action at law. The prayer is for a perpetual injunction and for general relief. Issues were joined by answer and reply, and a trial was had resulting in a judgment for the defendants, from which the plaintiff appealed.

Before the trial began, the plaintiff was refused leave to amend his petition by substituting ten years for six years as the length of time of the alleged abandonment and adverse occupancy of the strip of ground comprised in the road. We think this request should have been granted, but it does not appear to us that he suffered any prejudice from its denial. We have not been assisted by oral argument of counsel in an investigation of the question of fact involved, but we have carefully read the entire record and bill of exceptions, and we concur in the opinion of the trial court that the evidence is insufficient to establish an abandonment or adverse holding of the highway for any length of time. The surface of the tract of land across which it stretches is composed of an exceedingly light, in some places drifting, sand. As a consequence, when a road has been used sufficiently to destroy the grass roots it becomes impassable, or nearly so, and travelers have on that account diverged from the established highway at various places and made and followed divers new and unauthorized paths and trails across parts of the lands of the plaintiff, and it is likely that in this way the use of parts or sections of the lawful road has been discontinued for several years, possibly, of some of them, for as great or a greater length of time as or than the plaintiff alleges. But, although the corporate authorities have established and improved another and better

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highway which accommodates much of the travel in the vicinity, they do not appear to have done any act indicating an intent to abandon the one in controversy, nor do we think such an intent can be inferred from the fact that no attempt has been made to improve the latter, if it is capable of improvement, which is not shown. Neither do we think that the above described trespasses upon the lands of the plaintiff are indicative of an intent by the public to abandon the road, but rather of a disposition by individual travelers to avoid its difficulties by the unlawful use of private property.

For these reasons, we recommend that the judgment of the district court be affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

MARY A. LANGAN ET AL., APPELLANTS, v. THOMAS WHALEN
ET AL., APPELLEES.

FILED DECEMBER 7, 1906. No. 14,537.

Costs. Nothing can be taxed as costs in an action except such items as are prescribed by statute or are expressly authorized by the consent or agreement of the parties.

APPEAL from the district court for Hall county: JAMES R. HANNA and JAMES N. PAUL, JUDGES. *Reversed with directions.*

O. A. Abbott, for appellants.

R. R. Horth, contra.

AMES, C.

Appellants prosecuted in the district court an action against the appellees, which resulted in a trial and judg-

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ment for the defendants. From the judgment appellants desired to prosecute appeal or error to this court, and paid in advance to the official stenographic reporter of the court the compensation to which he was entitled by law for making a transcript of the oral evidence to be embodied in a bill of exceptions. The reporter neglected to make a transcript, and absconded from the state. Because of this circumstance, which deprived the plaintiffs of their right of review, they began and prosecuted an action to obtain a new trial in the district court. Appellees alleged, by way of defense, that the stenographic notes of the testimony made by the reporter were in the possession of his deputy, and that the latter was competent and willing to make the requisite transcript thereof. This allegation the plaintiffs denied, but upon its being supported by the oath of the deputy, a young woman, the court directed her to perform the service and continued the cause so as to afford her sufficient time for so doing. Afterwards she produced what she testified was a true transcript of the reporter's notes, but the plaintiffs objected to it as not being accurate and as being otherwise not in compliance with the statute. At the final hearing the court found "that no true and correct bill of exceptions can be procured," and rendered a judgment vacating the former judgment and granting a new trial as prayed. The order directing the transcript to be made by the deputy prescribed that each of the parties should bear one-half of the expense thereof until the final order of the court, but this direction was not complied with, and there was taxed against the plaintiffs, in the judgment awarding a new trial, the sum of \$50.75 as an item of costs for the making of the transcript and of certain exhibits attached thereto. The plaintiffs moved to retax the costs by expunging this item, but the court overruled the motion, and they appealed to this court.

The order denying the motion to retax is sought to be sustained by the oath of the deputy, who testified that before making her transcript, but immediately after the court had ordered the same to be made, she had a conversa-

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tion with the plaintiffs' attorney, outside the court room, in which she told him that her charge for doing the service would be 25 cents a folio, five times the statutory rate, and that the latter replied: "That's all right; that's very reasonable." This testimony was not disputed, but it was admitted over the objection and exception of the plaintiffs, and was, we think, wholly impertinent to the issue being tried. The most that can be inferred from it, if even so much can be inferred, is that the attorney entered into a contract with the deputy entitling her to certain compensation for certain contemplated services.

We suppose it to be unnecessary to cite authority to the effect that nothing can be taxed as costs in an action except such items as are prescribed by the statute or are expressly authorized by the consent or agreement of the parties. *Geere v. Sweet*, 2 Neb. 76. Not only is there in this record nothing tending to show such a consent, but the record discloses an explicit and persistent dissent and objection by the plaintiffs to the procurement of the services in question and to the incurring of any obligation with respect to them. If any agreement can be inferred from the conversation outside the court room, it falls far short of a consent that the amount of compensation there mentioned, or any other amount, shall be taxed as costs in the action.

We recommend that the order of the district court be reversed and the cause remanded, with instructions to retax the costs in conformity with law.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the order of the district court be reversed and the cause remanded, with instructions to retax the costs in conformity with law.

REVERSED.

NETTIE J. KIRKPATRICK ET AL., APPELLANTS, v. EMMANUEL
G. SCHAAL, APPELLEE.

FILED DECEMBER 7, 1906. No. 14,540.

Deed: CONSTRUCTION. A deed purporting to convey a half of a government quarter section of land that has not been previously subdivided by plat or survey, or otherwise, is operative as a conveyance of a quantitative half of the tract without regard to the rules of the United States land department with reference to the subdivision of such tracts.

APPEAL from the district court for Sarpy county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

H. Z. Wedgwood, for appellants.

George A. Magney, contra.

AMES, C.

The northeast quarter of section 3, in township 12, range 11, Sarpy county, as the same was surveyed and platted by the United States government, contains 164.85 acres. The government did not plat or survey this quarter section into halves or quarters, and at the time of the transaction hereinafter discussed there was no plat or survey of it except that above mentioned. In 1897 Milton G. Armes was the owner and in possession of it, and in July of that year executed and delivered to the defendant, Emmanuel G. Schaal, a warranty deed purporting to convey to the latter the "south half" of said quarter section, and thereupon the latter, with the knowledge and consent of his grantor, went into, and has since remained in, possession of the south half in quantity of the tract, to wit, 82.425 acres, and has continuously since said time cultivated and claimed the whole thereof as his own. In 1901 Armes executed and delivered to Kirkpatrick a warranty deed purporting to convey to him the "north half" of said quarter section. At and since the time of the execution of

this latter deed there was and has been a fence, erected by the common grantor, extending easterly and westerly across the tract at a place a rod or so north of where a divisional line would have separated the tract into two exact halves, so that Kirkpatrick did not come into actual possession of quite one-half of the ground; but it was not claimed by either party that the fence was intended to be or was upon the divisional line between their respective properties. It is well understood that a quarter section of land by government survey ordinarily contains 160 acres of land, but that on account of inaccuracies in surveying certain sections upon the north or east boundary of a township may contain more or less than that quantity, and this fact accounts for the 4.85 acres of "surplus" land in the quarter section in question. The regulations of the United States land department provide that, when in such cases the government surveyor subdivides a quarter section, the excess or deficiency so arising shall accrue to or be taken from the north or west half, or both, as the case may be, of the tract. Hence arose a controversy between the plaintiffs and the defendant with respect to the ownership of the above mentioned 4.85 acres, Kirkpatrick claiming the whole, and Schaal claiming half of it. But, as we have said, the land had not been subdivided by survey or plat. This action was begun in ejectment by the successors in title of Kirkpatrick to recover the 4.85 acre strip. The defendant answered by cross-bill, pleading the foregoing facts and praying a decree quieting his title in one-half the tract. There was an express waiver of a jury and a trial to the court, who found in favor of the defendant and rendered judgment according with his prayer. The plaintiffs appealed.

We can discover no error. The conveyance to the defendant was first in time and was half of an undivided quarter section of land. Presumably the reference was to quantity which was ascertainable and capable of being rendered certain, rather than to a regulation of the United States land department, of which both parties may have

been ignorant, and with which no compliance had been, or thereafter could have been, attempted. The defendant was put in peaceable possession, or, as the older lawyers would have said, had "livery" of a quantitative half, and thereafter continued to occupy and enjoy it.

It will hardly be contended that his grantor could have ousted him of any part of it, and if he could not have done so, his subsequent grantee, who merely succeeded to his remaining rights, was equally powerless. There is some oral evidence of what was said and done by the parties at and subsequently to the time of the transaction which may, perhaps, tend to support the foregoing conclusion, but there is doubt about its competency or admissibility, and we have excluded a consideration of it as well from our opinion as from our decision.

We recommend that the judgment of the district court be affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

**ANDREW P. ROSENBERG V. CHICAGO, BURLINGTON &
QUINCY RAILROAD COMPANY.**

FILED DECEMBER 7, 1906. No. 13,936.

1. **Railroads: FENCES: QUESTION FOR JURY.** Evidence examined, and held, that whether or not the defendant railroad company was excused for not fencing its track at the unincorporated station of Adelia was a question of fact that should have been submitted to the jury under proper instructions.
2. **Case Followed.** *Chicago, B. & Q. R. Co. v. Seveck*, 72 Neb. 793, followed and approved.

ERROR to the district court for Sioux county: WILLIAM H. WESTOVER, JUDGE. Reversed.

J. E. Porter, for plaintiff in error.

J. W. Deweese, F. E. Bishop and N. K. Griggs, contra.

OLDHAM, C.

This was an action by the plaintiff in the court below to recover damages for stock killed by trains on the defendant's right of way near the station of Adelia in Sioux county, Nebraska. The only allegation of negligence in the petition, which appears to have been supported by evidence sufficient to have sustained a judgment for plaintiff, is the allegation of defendant's failure to fence its track along its switch limits at the station where the injury occurred. At the close of all the testimony, the court directed a verdict for the defendant and entered judgment on the verdict. To reverse this judgment plaintiff brings error to this court.

It appears from the evidence contained in the record that Adelia is a station on defendant's line of railroad 14 miles northwest of Crawford, Nebraska. At this station is a depot, attended by a station agent, and there is a side-track half a mile long. From the depot about 300 feet to the northeast is a general store and post office, about 100 feet to the southwest is a stock yard, and about 25 feet to the northwest is a water tank and a pump house. There is a private road crossing the railroad right of way at the east end of the station. One of the cattle killed was struck near the switch frog about a quarter of a mile east of the depot; another about 27 rails east; and another about 20 yards east and near the private road. The switch limits extend a quarter of a mile on either side of the station, and according to the testimony the track was not fenced within about a half a mile on either side. There is no dispute as to the fact that the cattle were actually killed by defendant's cars at about the points above mentioned.

Defendant sought to avoid its statutory liability for its failure to fence its track by attempting to show that public

convenience and safety in the transaction of business at the depot, as well as the safety of the employees of defendant in switching and operating trains on the side track, were paramount to the letter of the requirements of the statute.

In the recent case of *Chicago, B. & Q. R. Co. v. Sercek*, 72 Neb. 793, and in opinion on rehearing, 72 Neb. 799, it was held, after a careful review of the authorities, that at an unincorporated station the railroad company is not bound to fence its road in such a manner as to prevent the public from having proper access to its station grounds, but that the failure to fence is only excusable to the extent of affording the public and the railroad company an opportunity for transacting business reasonably to be expected at such locality, and that the liability for not fencing should be determined by the necessity of not fencing at the point where the stock comes upon the railroad track. Now, clearly, the burden was upon the defendant to excuse itself from fencing by showing the necessity, under the above rule, for an open and unfenced station ground at the point at which the cattle sued for went upon the track where the injury occurred, and, unless this showing is so clear and convincing that reasonable minds could not differ in the conclusion reached, this question of fact should be submitted to the jury under proper instructions. We are fully convinced, after an examination of the record, that reasonable minds might well differ as to whether the business of the public with the depot and stock yard, or the proper operation of the railroad with due regard to its employees' safety, would have been in any manner interfered with by fencing the track at the points where the injuries occurred. We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES, C., concurs.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

ACME HARVESTER COMPANY ET AL., APPELLEES, v. EDWARD
CURLEE, APPELLANT.

FILED DECEMBER 7, 1906. No. 14,459.

1. **Principal and Agent: ACCOUNTING: PLEADING: EVIDENCE.** Where defendant is sued for an accounting for goods alleged to have been received under the terms of a written contract of agency, he may, under a general denial, show that the goods in controversy were received under another and different contract from that laid in the petition.
2. **Rulings: ERROR.** Action of the trial court in the exclusion of testimony examined, and held prejudicial.

APPEAL from the district court for Red Willow county:
ROBERT C. ORR, JUDGE. *Reversed.*

Hall, Woods & Pound, for appellant.

E. M. Bartlett and W. S. Morlan, contra.

OLDHAM, C.

This is an appeal from a judgment rendered by the district court for Red Willow county in a suit for an accounting originally instituted by the Acme Harvester Company against the defendant, in which the First National Bank of Chicago was afterwards joined as plaintiff by leave of the court. The suit was based upon a written contract of agency entered into by the Acme Harvester Company with the defendant, and asked for an accounting of moneys, notes, machinery and other property, which was alleged to have come into the defendant's hands under the written contract of agency. The petition also prayed

for an injunction to restrain the defendant from disposing of the property, and for the appointment of a receiver to take charge of the property pending the litigation. The First National Bank of Chicago was the assignee of the contract, and held it as security for an indebtedness owed to the bank by the harvester company. The answer to the petition was a general denial. On a trial of the issues to the court, a judgment was rendered in favor of the plaintiff, as prayed for in its petition. To reverse this judgment defendant has appealed to this court.

The conditions of the written contract of agency, on which plaintiff relies, were set forth at length in the petition. The contract contains provisions for the sale on commission of machines and extras thereafter to be ordered by the defendant. The company did not unconditionally bind itself to furnish the machinery and extras when ordered, but agreed that it would do so "as fast as the same are ordered to the extent of its ability so to do; provided, however, if from any cause whatever it is unable to furnish the machines ordered, or any extras thereto, it shall not be liable for any damages whatever." The amount of the commission on certain of the machines named in the contract was to be determined at a later time than the signing of the contract, and the exhibit attached to the contract contained a certain list on which no prices were fixed or commissions named at the time of the signing of the contract. The contract also had a provision concerning the machines then on hand, but, as there were none in defendant's possession at the time it was signed, this portion of the contract has no bearing on the controversy, for the suit was brought only for an accounting for machines and repairs alleged to have been delivered to the defendant after the signing of the contract and under the conditions therein enumerated. Under this condition of the contract, the plaintiff, in support of its cause of action, offered the depositions of two of its agents, W. A. Howard and W. G. Michael, for the purpose of showing, among other things, that there were

thirteen or fourteen sample or second-hand machines delivered to defendant for sale on commission, on which no prices were fixed in the written contract and on which, by a subsequent oral agreement between the agent of the company and the defendant, a 20 per cent. commission was to be allowed on whatever the machines could be sold for. When plaintiff had closed its testimony, defendant was offered as a witness in his own behalf. After admitting his signature to the written agreement alleged upon, and that that was the only written agreement that he had signed for the sale of machines during that year, he was asked by his counsel:

"Q. You may state whether or not there was a subsequent oral contract between yourself and the Acme Harvester Company with reference to the handling of machinery for the company. A. There was."

"Plaintiff objects as not admissible under the issues joined, incompetent and irrelevant. Sustained. Defendant excepts. The defendant offers to prove by the witness on the stand that subsequently to the date of the alleged contract attached to the petition he did make an oral contract with the Acme Harvester Company through its agent, Mr. Howard, and that the machinery in controversy was sold to him and handled by him under and pursuant to said oral contract, and not in pursuance of the written contract claimed by the plaintiff. Plaintiff objects on the ground that no such issue is tendered by the answer, and on the further ground that whatever machinery he received from the plaintiff was to be disposed of according to the terms of the written contract. Sustained. Defendant excepts." Being thus excluded from introducing evidence to support the defense relied on under his general denial, defendant offered little other material testimony, and now assigns the action of the trial court in excluding this evidence as reversible error.

The first objection interposed to the testimony, which was that it was not admissible under the issues joined, we think is untenable from an inspection of the pleadings

The suit was instituted for an equitable accounting between the plaintiff and defendant under an alleged written contract of agency, by the terms of which defendant was said to have received the machines and extras in controversy. This contract on its face was not completed at the time it was signed, and required other acts to be done by the parties before machines should be delivered under it; that is, it required defendant to order the goods and plaintiff, if it were possible and convenient, to fill the orders. Consequently, a general denial put in issue the question as to whether or not the goods were actually ordered and received under the terms of this contract. In other words, the writing, standing alone, did not evidence an executed contract, but rather an executory one requiring in some of its terms a subsequent oral agreement between plaintiff and defendant for its completion. Again, there is nothing in the contract that either specifically binds the defendant to order any number of machines from the plaintiff, or, as before pointed out, that required plaintiff to unconditionally furnish the machines when so ordered. Consequently, until the order for and delivery and receipt of machinery under the contract, there was no completed contract. It was therefore incumbent upon the plaintiff to show that the machines were actually sold and delivered under the contract alleged upon. *Kingman & Co. v. Davis*, 63 Neb. 578. It would then follow that, under a general denial, defendant might show the receipt of machines and extras under another and different contract from that alleged upon by the plaintiff. *Wiedeman v. Hedges*, 63 Neb. 103. *Young v. Jones*, 8 Ia. 219. In the latter case it was said: "It is evident that the defendant may be allowed to show, in any manner, that the contract laid in the petition was not the agreement of the parties; and what mode so effectual for this purpose, as to prove an entirely different contract and promise of defendant?" It must be remembered that this is not an action at law for the breach of an alleged written contract, but rather a suit in equity for an accounting for property charged to have

been received under such contract, so that at the threshold of the issue lies the question as to whether or not the goods were received by defendant under the contract alleged upon.

The second ground of objection, "that whatever machinery he received from the plaintiff was to be disposed of according to the terms of the written contract," rests upon a mere assumption of the truth of the allegations to be established. Of course, if the defendant received the goods under the terms of the written contract, he must account for them according to such terms, but, if, as he was attempting to prove, he received them under another and different contract, his accounting would be made accordingly.

Again, the court permitted the plaintiff to show in chief that a portion of the machinery was sold and delivered to defendant under a subsequent oral contract, and, having permitted plaintiff to go into this question in chief, it was clearly erroneous to prevent the defendant from showing how many of the machines were received under such subsequent oral agreement.

We are therefore of opinion that the learned trial court erred in excluding the testimony offered, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

JOHN K. McMILLAN ET AL., APPELLANTS, V. WILLIAM
DIAMOND ET AL., APPELLEES.

FILED DECEMBER 7, 1906. No. 14,513.

Appeal: EVIDENCE: PRESUMPTIONS. This court will take jurisdiction of an appeal in equity, where no bill of exceptions is filed with the transcript; but if the judgment of the district court is one which might be supported by competent testimony on questions of fact arising on the pleadings, in the absence of a bill of exceptions containing the testimony, we will presume that the judgment is supported by the evidence.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Affirmed.*

C. O. Whedon and Berge, Morning & Ledwith, for appellants.

Field, Ricketts & Ricketts, contra.

OLDHAM, C.

This was a petition in equity by numerous plaintiffs, who were owners of lots and tracts of land within the corporate limits of the village of College View, Lancaster county, Nebraska, against the trustees of that village, in which the plaintiffs asked to have the various tracts of real estate owned by them excluded from the corporate limits of the village. The petition alleged, among other things, that many of the owners of the various tracts of land were not legal voters of the village, and for that reason they had no adequate remedy at law under section 101, ch. 14, art. I, Comp. St. 1905. The defendants answered plaintiffs' petition, admitting that the different plaintiffs were the owners of the tracts of land; that such tracts were situated within the corporate limits of the village, but denied that the lands were not suitable for village purposes, and alleged that plaintiffs and their grantors had joined in a petition asking for the incorpora-

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tion of the territory sought to be excluded from the limits of the village. On issues thus joined there was a trial to the court, it appearing from the record that evidence was taken for two days on the disputed questions of fact arising on the pleadings, and that the cause was taken under advisement by the judge, who thereafter entered the following findings and judgment: "This cause, having been heretofore on a day of a former term of this court tried and submitted to the court, now comes on for final determination, and after due consideration, and being fully advised in the premises, the court finds that all of the property described in plaintiffs' petition was upon the 25th day of April, 1892, by the board of county commissioners of Lancaster county, Nebraska, acting upon a petition signed by over 200 residents of the territory in said petition described, incorporated in the village of College View; that no protest on the part of any of the relators herein was made to such action on the part of said board of county commissioners, nor was any appeal or error proceedings prosecuted therefrom. The court further finds that a bill in equity will not lie for the relief prayed for in plaintiffs' petition, but that the only remedy is by quo warranto proceedings to vacate the order of said board, in event it should appear that said order was made without authority. Wherefore, the court finds that there is no equity in the relators' bill, and that the same should be dismissed at their costs. It is therefore considered, ordered and adjudged by the court that this action be, and the same hereby is, dismissed at the costs of the relators, taxed at \$99, for which execution is hereby awarded." To reverse this judgment plaintiffs have appealed to this court on a transcript of the proceedings, without having a bill of exceptions containing the testimony prepared and filed with the transcript.

The first question with which we are confronted is as to the jurisdiction of this court to entertain an equity appeal without a bill of exceptions containing the testimony offered in the court below. In the early case of *Arnold v.*

Baker, 6 Neb. 134, it was held that, where a demurrer had been sustained to plaintiff's petition, the action of the trial court in sustaining the demurrer might be reviewed on appeal, without a bill of exceptions. This holding has been followed in an unbroken line of decisions down to and including *National Wall Paper Co. v. Columbia Nat. Bank*, 63 Neb. 234, so that we take it as the settled rule of this court under the former statute that we should take jurisdiction in an equity appeal, where the transcript is filed within the time prescribed by statute, although no bill of exceptions is prepared and filed therewith. The new statute of appeals has not changed this rule.

While it is clear that we have jurisdiction of the cause, we cannot lose sight of the principle that a judgment of the district court is presumed to be right until sufficient of the record of the proceedings in which it was rendered is presented to this court to establish the contrary, and that, if the judgment be one which might be supported by competent testimony on disputed questions of fact properly pleaded, we will presume, in the absence of a bill of exceptions containing the evidence, that such testimony was produced at the trial of the cause.

While it is true that in the judgment rendered by the trial court the court expressed the opinion that a bill in equity will not lie for the relief prayed for in plaintiffs' petition, yet it also recites findings of fact with reference to the incorporation of the village and the acquiescence of plaintiffs therein that might, if supported by proper testimony, sustain the judgment that there was no equity in the bill, even if a bill in equity would lie for the relief sought. On this latter question, however, we express no opinion; but, because the record shows that testimony was taken at the trial, and because there were disputed questions of fact on which plaintiffs' theory of the case depended, we think it our duty to presume, in the absence of a showing to the contrary, that the evidence introduced was sufficient to support the judgment of the trial court. If a demurrer

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had been sustained to the petition, or if on a demurrer *ore tenus* the court had excluded the evidence offered by plaintiffs, the record would then present the question of the jurisdiction of a court of equity to grant the relief prayed for. But there was no demurrer filed, and there is no record showing that any evidence was excluded, and the facts on which plaintiffs relied for equitable relief were put in issue by defendants' answer. Hence, we feel constrained to presume that the judgment of the trial court was sustained by the evidence.

We therefore recommend that the judgment be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ESTATE OF CHRISTIAN G. RAPP, APPELLEE, V. CHARLES S. ELGUTTER, APPELLANT.

FILED DECEMBER 7, 1906. No. 14,535.

1. **Executors and Administrators: CONTRACT FOR LEGAL SERVICES.**
Where a contract for legal services which is reasonable and beneficial to the estate has been entered into by an administrator or executor, such contract may be upheld and enforced by the court having charge of the administration of the estate.
2. **Attorney and Client: CONTRACT: ESTOPPEL.** An attorney at law who agrees with an executor or administrator to conduct certain legal business of the estate for a sum named is estopped to deny that such sum is a reasonable consideration for the services rendered pursuant to such agreement.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

Charles S. Elgutter, pro se.

T. J. Mahoney, contra.

OLDHAM, C.

On the 14th day of January, 1902, Christian G. Rapp departed this life in Douglas county, Nebraska, leaving a last will and testament, in which he nominated L. E. Roberts as executor, and by the terms of the will provided that, after the payment of his debts, the residue of his estate should be devoted to the erection of a suitable monument over the grave of his parents. When the will was offered for probate by the proponent, a contest was filed against it, and, pending the probate proceedings, Roberts was appointed and qualified as special administrator of the estate. He thereupon employed the claimant in this cause of action, Charles S. Elgutter, a practicing attorney at the bar of Douglas county, to defend the contest of the will and to perform other services for him as special administrator of the estate. At the trial of the contest in the county court, judgment was rendered in favor of the proponent, and the will was admitted to probate. This judgment was appealed from by the contestants, but the appeal was dismissed on motion of the proponent in the district court. After the will was finally admitted to probate, Roberts qualified as executor and proceeded with the administration of his trust. Mr. Elgutter filed his claim in the county court for legal services rendered in behalf of the special administrator and in the defense of the contest of the will, all in the sum of \$500. The executor contested this claim, alleging that, before rendering any services in the contest of the will, Mr. Elgutter had agreed to try the case for \$50 in the county court and \$50 additional compensation if the case was appealed to the district court. It was agreed between the parties that the extra services rendered for the special administrator were of the reasonable value of \$50, and, on a hearing of the claim in the county court, judgment was rendered for \$150 in favor of the claimant. To reverse this judgment the claimant appealed to the district court, where, on a trial to the court and jury, a verdict was returned in

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favor of the claimant for \$150, the amount allowed by the county court. This verdict was set aside for numerous errors alleged in a motion for a new trial filed by the claimant, and a new trial granted. At the subsequent trial, a jury was waived by consent of the parties and the cause was submitted to the court, and judgment was again rendered in favor of the claimant for \$150. To reverse this judgment the claimant has appealed to this court.

As before stated, the reasonable value of the extra services rendered for the special administrator was agreed upon, so that the only question at issue here is as to the allowance for services rendered in the will contest. The testimony of the executor tends to show that Mr. Elgutter agreed to defend the will for the specified sum of \$50 in the county court, and \$50 in the district court. His testimony is corroborated in this particular by the evidence of the clerk of the probate court, Mr. Sunblad, who was present when the contract was made. He also testified, however, that Mr. Elgutter said: "It didn't make much difference what arrangements they might make, that the court would fix the fee anyhow." Mr. Elgutter admitted that he may have named \$50 in each of the courts as the probable fee, but that this was merely a matter of opinion, without knowledge of the full extent of the services to be rendered, and that what he intended to offer was to render the services for such sum as the court would find to be reasonable and just. We are satisfied, from an examination of the testimony, that the trial judge was fully justified in finding, as a matter of fact, that the conversation had at the time of the employment led the executor to believe that the sum intended to be charged for the services was \$50 in each of the courts, and no more.

The claimant practically concedes that the evidence is sufficient to support the findings of fact in this branch of the case, but he contends that, because the contract with Roberts was not binding upon the estate, it could not and should not be held to have bound the claimant; and that, as the trial court in his special finding held that, aside

from the existence of the contract, the services rendered by the claimant were shown by the evidence to have been worth more than \$100, this special finding is inconsistent with the general finding and judgment of the court. Many hair-splitting distinctions are indulged in by the claimant in attempting to determine the exact capacity in which Roberts was acting when he made the alleged contract for services in defending the will. It is contended that, although at that time he was acting as special administrator, Roberts was not executor, but simply proponent of the will, and that as administrator he had no interest in the outcome of the contest of the will and could not contract with reference to it. So far as the conclusion about to be reached is concerned, we do not care to enter into a discussion of these niceties. It is clear from the record that, in view of his nomination as executor of the will, Roberts qualified as special administrator and offered the will for probate, and, when the will was finally admitted to probate, he qualified as executor. So that, in any event, he acted in a trust relation toward the effects of the estate when the contract was made. And, while it is true that he was not authorized in his trust relations to bind the estate by an unreasonable contract for legal services, it is equally true that in any one of them he was entitled to a just and reasonable compensation for legal services procured for the benefit of the estate. So that the question of the legality or illegality of the contract at issue depended upon its being reasonable and beneficial to the estate. *McCoy v. Lane*, 66 Neb. 847. The fact that an executor or administrator cannot bind the assets of his estate for the payment of an exorbitant or unreasonable fee for legal services does not prevent an attorney at law from binding himself in a reasonable and beneficial contract for services to be rendered in behalf of such executor or administrator. And we think that, in sound reasoning and good morals, an attorney who has induced an administrator, executor, or guardian to employ him to represent the interests of an estate by the use of language that would

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reasonably lead such executor, administrator or guardian to believe that such services would not exceed a sum named is, and should be, estopped from demanding of the estate a greater sum than that suggested as an inducement to his employment.

There is a further contention in the brief of the claimant that, because a motion for a new trial was granted after the first trial of the cause in the district court, and because one of the grounds of the motion was the refusal of an instruction practically directing a verdict for the plaintiff for the reasonable value of the services rendered as shown by the testimony, the action of the trial judge sustaining this motion was binding as the law of the case on the judge who subsequently tried the cause. This contention is wholly unavailing in any view of the case, and especially in view of the fact that numerous reasons were alleged in the motion for a new trial, and there is nothing in the judgment granting it which shows the reason of the judge for doing so.

Finding no reversible error in the record, we recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ANDREW YOUNG ET AL., APPELLANTS, V. CITY OF ALBION
ET AL., APPELLEES.

FILED DECEMBER 7, 1906. No. 14,827.

Appeal: TEMPORARY INJUNCTION: FINAL ORDER. An order dissolving a temporary injunction, and which does not determine or make some final disposition of the case in which the injunction was issued, is not final, and is not alone, or until after a final judgment in the action, reviewable on error or appeal in this court. *Meng v. Coffee*, 52 Neb. 44, followed and approved.

APPEAL from the district court for Boone county:
JAMES N. PAUL, JUDGE. *Dismissed.*

E. E. Spear and H. C. Vail, for appellants.

M. W. McGan, J. S. Armstrong and Edwin Vail, contra.

OLDHAM, C.

Prior to the 28th day of May, 1906, the city of Albion, a city of the second class, having less than 5,000 inhabitants, had been divided by ordinance into three wards, each ward having two members of the council. On the 28th day of May the mayor and council of the city, by ordinance duly enacted, provided for dividing the city into but two wards and defining the boundaries of each of the wards so provided for. The ordinance also contained a provision that all members of the council who had been duly elected thereto should continue in office until the expiration of their respective terms. On June 2, 1906, the plaintiffs herein, as resident taxpayers and qualified voters of the city, filed a bill in equity, in which they alleged the passage and publication of the ordinance above referred to by the mayor and council of the city of Albion, and that prior thereto the city had been divided into three wards, containing practically the same number of voters and the same area of territory, and that the change contemplated by the division provided for in the ordinance of May 28 was not nearly as equal or practical as to either area or inhabitants as the former division of the city in the ordinance repealed by the act of May 28. The petition then set out that the ordinance alleged against attempted to illegally continue certain members of the council as councilmen from wards from which they were not elected. It also alleged that the council is about to pay for the publication of the ordinance objected to, and will, unless restrained, illegally pay for salaries of officers contemplated in said ordinance, and will illegally expend public money

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in holding elections in the wards provided for, and that they will attempt to transact the business of the city in an illegal manner under the provisions of this ordinance, unless restrained by an order of the district court. The prayer of the petition is, in substance, that the ordinance be declared illegal and void, and that the defendants be enjoined from enforcing or attempting to enforce the provisions thereof in any manner, and from disbursing any public money for the publication of the ordinance or in payment of any expenses incurred by the defendants, or any of them, thereunder, and from doing any act or thing whatsoever that was made possible by said ordinance that could not have been done if said ordinance had not been enacted. On an application to the county judge of Boone county, in the absence of the district judges, a temporary order of injunction, as prayed for in the petition, was procured on the 2d day of June, 1906. On the 8th day of June an answer to the petition was filed in the district court, and on the 9th day of June a motion to dissolve and vacate the temporary order of injunction was filed. Notice of this motion was duly served upon the attorneys of the plaintiffs, and on the 13th day of June the motion was heard, and the following judgment was rendered: "Now, on this 14th day of June, 1906, one of the days of the June, 1906, term of court, trial hereof was concluded, evidence having been fully adduced herein, and the cause was submitted to the court on the pleadings, the stipulations in open court made, and the evidence, and the court, being fully advised in the premises, finds that there is a want of equity in the petition, and it is therefore by the court ordered, adjudged and decreed that the temporary order of injunction heretofore granted herein be, and the same hereby is, vacated, set aside and dissolved, to which finding and judgment the plaintiffs except, and are allowed 40 days in which to prepare and serve a bill of exceptions, and the bond necessary to be filed on dissolution of this injunction to supersede the judgment of this court is hereby fixed in the sum of \$3,000, and to the fixing

of a supersedeas bond in any amount whatever the defendants and each of them except." To reverse this order and judgment, plaintiffs have appealed to this court.

A motion was filed in this court by the defendants to dismiss the appeal, because the order from which the appeal is taken is interlocutory and not a final order. By agreement of the parties, argument on the motion to dismiss was continued until the final hearing of the cause on November 21, 1906. We think the order appealed from is, on its face, clearly interlocutory and not a final order. The motion on which it was rendered sought to vacate and set aside the injunction theretofore granted, that is, the temporary order granted by the county judge. No other relief was asked in the motion, and the judgment of the court is "that the temporary order of injunction heretofore granted herein be, and the same hereby is, vacated, set aside and dissolved." There is no order made that touches upon a final disposition of the plaintiffs' petition, and from aught that appears the petition and answers thereto are still pending in the district court for Boone county, awaiting such final order and judgment as the court may hereafter render. In the early case of *Scofield v. State Nat. Bank*, 8 Neb. 16, it was held that an order of a judge of a district court dissolving a temporary injunction is not final, but interlocutory merely, and insufficient to support a petition in error. Again in *School District 15, Douglas County, v. Brown*, 10 Neb. 440, it was held that an order dissolving a temporary injunction could not be reviewed upon appeal, and this in a case where the only relief sought was an injunction. In the later case of *Meng v. Coffee*, 52 Neb. 44, the former decisions of this court were reviewed, and the rule was announced in the syllabus that "an order dissolving a temporary injunction, and which does not determine or make some final disposition of the case in which the injunction was issued, is not final, and is not alone, or until after a final judgment in the action, reviewable on error or appeal to this court."

We therefore conclude that, under the well-established

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rule of this court, the motion to dismiss the appeal should be sustained, and we recommend that the appeal herein be dismissed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the appeal herein is

DISMISSED.

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UNION PACIFIC RAILROAD COMPANY ET AL. v. LILLIE
EDMONDSON, ADMINISTRATRIX.

FILED DECEMBER 7, 1906. No. 14,307.

1. **Master and Servant: INJURY: EVIDENCE.** In an action for damages caused by alleged defects in defendant's machinery, evidence of the same defective condition immediately before and after the accident complained of is admissible for the purpose of proving the condition of the machinery, and, as to its prior condition, for the additional purpose of showing knowledge on the part of the defendant.
2. **Evidence: DECLARATIONS.** In an action for the negligent killing of an employee by a railroad company, alleged as the result of a defective condition in the engine, evidence of a declaration of the engineer in charge regarding such defective condition, made at the time, and under such circumstances as to raise the presumption that it was an unpremeditated and spontaneous explanation of the casualty, is admissible as a part of the *res geste*.
3. **Appeal: RECORD.** To obtain a review of the rulings of the district court on objections to alleged misconduct of counsel in addressing the jury, the record must show, not only that objections were made, but the matter objected to, and the rulings of the court thereon.
4. **Trial: WITHDRAWING REST.** The district court may permit a party to withdraw his rest and introduce additional evidence, when it appears that the same is required in the furtherance of justice, and no undue advantage is thereby acquired over the adverse party.

ERROR to the district court for Platte county: CONRAD HOLLENBECK and JAMES G. REEDER, JUDGES. *Affirmed.*

John N. Baldwin and Edson Rich, for plaintiffs in error.

John J. Sullivan, contra.

EPPERSON, C.

Cameron Edmondson, a brakeman in the employ of the defendant company, was thrown from the top of a freight car by the sudden stopping or slacking of the train on which he was employed, and was instantly killed beneath the car. The administratrix of his estate brought this action to recover damages, alleging that the death was the result of defendant's negligence in maintaining a defective air pump and apparatus attached to the engine in control of the train. It was further alleged that defendant Herod was in the employ of his codefendant, and that it was his duty to see that the engine was kept in good order and was safe and fit for use. The undisputed evidence shows the following facts: At the time of the accident the train was engaged in switching at Spalding, in this state. In the course of the switching, the deceased, as his duty required, gave a signal for a service or gradual stop. In response, the engineer properly adjusted the lever. There was a change in the motion of the train, and the deceased, who was standing near the rear end of the last car, in a train of about 11 cars, was thrown to the ground and killed. Plaintiff's theory is that, on account of the defective condition of the machinery, the train, instead of coming to a service stop, came to an emergency or sudden stop, which was the proximate cause of Edmondson's death. Plaintiff recovered \$3,000 in the court below, and defendants bring error.

Defendants contend that the court erred in admitting evidence of the defective condition of the engine, from three to six days subsequent to the injury, arguing that such evidence was not proper for the purpose of showing negligence on the part of the defendants. The evidence

was given by a former employee of the defendant company and is as follows: "Q. Do you remember the occasion while you were in the employ of the Union Pacific Railroad Company, that engineer Dolan started out with his engine, and after having gone some distance on his trip he returned with the engine to the roundhouse, and leaving it there for repairs and taking out another engine to complete his run? A. I remember of his bringing the engine back to the roundhouse shortly after the accident in which Mr. Edmondson was killed." So far this testimony only shows that the engine was taken from the roundhouse and returned. Reasons for its return are not apparent. The evidence was, without more, immaterial but was not prejudicial. Continuing, this witness gave testimony, objected to, in substance as follows: "I don't know much about the air, but I know it was out of repair quite often. Q. Do you know it was ever reported for repairs? A. Not positively. Of course I saw some reports * * * I noticed once he (the engineer) made a report for the air pump to be fixed. * * * That was shortly after Mr. Edmondson was killed. * * * It might have been three days afterwards, and it might have been six." It is a rule lately followed in most courts where this question has been considered that evidence of subsequent repairs to machinery alleged to have caused an injury is incompetent as proof that the defendant was guilty of negligence. *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202; 1 Wigmore, Evidence, sec. 283; 1 Elliott, Evidence, sec. 186; *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465. The evidence was, however, proper for the purpose of showing the defective condition of the machinery. It was incumbent upon the plaintiff to show the dangerous condition of the machinery, the defendants' knowledge thereof, and their negligence in maintaining the same. In 2 Labatt, Master and Servant, sec. 820, it is said, in part: "But a more logical theory is embodied in the statement that, in an action by an employee against an employer for an injury caused by a defect in the plant, it is

not necessary to adduce evidence of the condition of the plant at the precise moment the casualty occurred, and that it is enough to prove such a state of facts shortly before or after the casualty as will induce a reasonable presumption that the condition was unchanged."

Defendants also except to evidence showing that within 30 days prior to the accident the apparatus in question failed to respond properly and that its defective operation was the same as at the time of the accident. The same rule applies to this testimony as to the evidence regarding the subsequent condition of the machinery, and it is admissible for the additional purpose of showing knowledge on the part of the defendants. In *Brewing Co. v. Bauer*, 50 Ohio St. 560, it was held: "In an action by an employee against his employer for damages resulting from an injury received in operating a machine caused by its defective construction, the defects being charged to the negligence of the employer, it is competent to prove that, on a former occasion, while it was being operated by another, the machine worked in a manner similar to when the plaintiff was injured. But such evidence is only competent to prove the defective character of the machine and the employer's knowledge of the fact; it is not competent to prove actionable negligence on the part of the employer at the time the plaintiff was injured." Being competent for one purpose, its admission over a general objection was proper. The defendant failed to ask for an instruction limiting the consideration of this evidence by the jury and may not now complain that it was admitted without qualification. 1 Elliott, Evidence sec. 151.

During the trial plaintiff called several witnesses who testified that at the time of the accident and when the dead body of Edmondson was discovered by the engineer in charge of the train, he said: "My God! There must be something the matter with the air. It has bothered me ever since I left Genoa." Defendants objected to this evidence, and now contend that its admission was reversible error. The engineer had been in charge of the

train from Genoa to Spalding, the place of the accident. He was in control of the engine, though not personally operating it, when Edmondson was killed. He was in the line of his duty when he made the statement. Defendants contend that the statement, if made, was only the conjecture of the engineer as to a possible cause of the accident and for that reason was not admissible as a part of the *res gestæ*. The exclamation, in our opinion, was a statement of a fact, or a declaration made under such circumstances as to raise the presumption that it was the unpremeditated and spontaneous explanation of the fatal accident. Being such it was a part of the *res gestæ* under the rule often followed by this court. *Union P. R. Co. v. Elliott*, 54 Neb. 299; *Missouri P. R. Co. v. Baier*, 37 Neb. 235; *Collins v. State*, 46 Neb. 38; *City of Friend v. Burleigh*, 53 Neb. 674. The testimony objected to being proper, we reach the conclusion that the verdict was sustained by sufficient evidence. Defendants present no theory of the accident, and the inference deducible from the evidence is consistent with plaintiff's theory.

Defendants contend that a new trial should be granted on account of alleged misconduct of plaintiff's counsel. During the cross-examination of one of the defendants' witnesses, the engineer, plaintiff's counsel asked: "Before the man was cold, before the blood stopped flowing, you directed Speice to hunt up evidence, didn't you?" The only objection interposed was that it was incompetent, irrelevant and immaterial. The question was not answered. Then followed: "Was the man's body cold before you directed Speice to look around for evidence?" This was objected to as "incompetent, irrelevant and immaterial, and asked for the purpose of prejudicing the jury." This objection was overruled. We do not think this question would necessarily prejudice the defendants in the minds of the jurors. This, however, seems to have been the object of counsel and such conduct might well have been reprimanded by the court. The facts brought out might have affected the credibility of the witness as

showing his interest. Such purpose of the query would be legitimate. It seems to us that the question was not so plainly prejudicial as to require reversal of the judgment.

During the argument of the case to the jury by plaintiff's counsel, certain statements were objected to by defendants as improper. To some of the objections no ruling was made by the court, but counsel was told to confine his argument to the evidence. No definite ruling was asked for by the defendants, nor did they request an instruction directing the jury to disregard the remarks of counsel. The prejudicial statements do not appear in the record. Not only should the record show the objections made, but also the matter objected to, and the rulings of the court thereon. In the case of *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 134, this court, after citing many prior decisions pertaining to the conduct of attorneys in the argument of cases to the jury, said: "These cases establish the further proposition that the defeated party in a litigation, in order to take advantage of the alleged misconduct of opposing counsel, must call the attention of the trial court to such misconduct at the time it occurs, ask the trial court for protection therefrom, preserve in a bill of exceptions the alleged misconduct of counsel, with the rulings of the trial court and the party's exceptions thereto, and present the record of what occurred and the rulings of the trial court as an assignment of error in the proceedings brought here." In the case at bar the record only shows the objections made. This is insufficient to show that the statements appearing in the objection were in fact made by counsel. Neither can we conclude that the district court erred in the matter, as his rulings do not appear of record, nor did the defendants insist upon a ruling. In *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 70 Neb. 766, it was held: "Alleged misconduct of counsel in addressing the jury must be objected to when the language is used, and a ruling of the trial court procured on such objection and

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an exception saved to the ruling to make the objection available in this court."

After plaintiff rested her case, defendants asked for a directed verdict. This request was denied. The court thereupon permitted plaintiff to withdraw her rest and introduce proof showing the administrative capacity of the plaintiff. It is established as a rule of practice in this state that the trial court may permit a party to withdraw his rest and introduce additional evidence, when the same is required in the furtherance of justice, and no undue advantage is thereby acquired over the adverse party. *Tomer v. Densmore*, 8 Neb. 384; *McClellan v. Hein*, 56 Neb. 600; *Fremont, E. & M. V. R. Co. v. Crum*, 30 Neb. 70. The action of the trial court in permitting additional testimony to be introduced was not an abuse of discretion.

We find no error in the record, and recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

THEODULE KERTSON, APPELLANT, v. BARTHOLOMEW KERTSON ET AL., APPELLANTS; MARIE V. DESAUTELS ET AL., APPELLEES.

FILED DECEMBER 7, 1906. No. 14,435.

1. Contract: RATIFICATION. When a party who claimed he had been fraudulently induced to enter into a contract by reason of the concealment of material facts afterwards employs counsel, and after full investigation ratifies and indorses the contract and accepts benefits under it, he is bound by such ratification, and cannot again question the validity of the original contract.
2. Evidence examined, and held to uphold the judgment of the district court.

APPEAL from the district court for Madison county:
JOHN F. BOYD, JUDGE. *Affirmed.*

M. B. Foster, Tibbets & Anderson and J. W. Molyneaux,
for appellants.

Allen & Reed and M. D. Tyler, contra.

EPPERSON, C.

George S. Kertson, a bachelor, 76 years of age, and a resident of Madison county, in this state, died in said county on the 11th day of April, 1902, seized of a tract of 480 acres of land lying in said county, which is the subject of this litigation. He left surviving him four brothers and one sister of the half and one of the full blood, and issue of a deceased sister. Of these persons, three of the brothers and one George E. Marquette, sole issue of one of the deceased sisters, were residents of the United States and the remainder were residents of the Dominion of Canada and subjects of the British crown. All of these persons claimed to be heirs at law of the deceased. He also left at his death an instrument purporting to be his last will and testament by which he disposed of his entire estate, except the said tract of land, to persons other than those above mentioned. Some two years prior to his death Kertson executed a deed purporting to convey the land to William A. Lafleur and deposited it with the First National Bank at Madison, together with a written direction to the bank that the instrument should be retained by it and should not become effective until after his death, when it should be delivered to the grantee.

Upon the death of the grantor, the deed was delivered to Lafleur, who filed it for record with the register of deeds of the county, and the will was also proposed for probate by one of the executors therein named. The sister and half sister and one of the brothers and the issue

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of one of the deceased sisters of the deceased, through William V. Allen and Willis E. Reed, as their attorneys, filed objections to the probate of the instrument on the ground of the alleged mental incompetency of the testator. The objections were overruled and an order of probate rendered from which an appeal was taken to the district court. By this instrument a legacy and bequest were given to Lafleur aggregating about \$6,000 in amount and value. At about the same time A. Napoleon La Forest and others, claiming as heirs at law of the deceased, began an action by Allen & Reed, as their attorneys, to restrain Lafleur from disposing of or incumbering the land until such time as the title thereto could be judicially ascertained and determined, and praying that it be declared and quieted in themselves and others who should be found to be such heirs. On the 3d day of June, 1902, a written stipulation in this action was entered into to the effect that, in order to prevent delay in the probating of the will, and tedious and expensive litigation, Lafleur should and did relinquish all claims as beneficiary under said will, and should convey the land by separate deeds to one Peter Rubendall in trust, one-half thereof for the heirs at law of the deceased, and the other half for William V. Allen and Willis E. Reed. And, in further consideration of the premises, it was stipulated that Lafleur should be paid the sum of \$6,000 in money out of the first distribution of the proceeds of the personal estate of the deceased, which sum should be charged as a lien upon the land, and should become due in April, 1903, until which time the deeds should be in escrow. This instrument was signed by Lafleur, by his attorneys of record, and by Allen and Reed, as attorneys for certain of the heirs at law named therein, and purported to be for the benefit of all other such heirs as should see fit to participate therein and in the settlement thereby effected. One Mary Sweeney, a resident of the state of Illinois, was bequeathed by the will a legacy of \$5,000, and after the execution of the foregoing agreement Allen

& Reed carried on such negotiations with her as resulted in the execution by her on the 11th day of November, 1902, of a written assignment to them, for the benefit of their clients, of her right thereto for the sum of \$2,500 in money, which they advanced.

On the first day of May, 1903, a further stipulation was entered into by and between Lafleur and all the heirs at law of the deceased, by which the former stipulation of June 3, 1902, was expressly ratified and confirmed, and the heirs expressly assumed and agreed to pay the \$6,000 reserved to Lafleur out of the first moneys derived from a distribution of the proceeds of the personal estate, and by which Lafleur again stipulated to relinquish his demands upon the estate and to make conveyance of the land to or for the benefit of the heirs and Allen & Reed pursuant to the former agreement. This latter stipulation was executed by Lafleur, by his attorneys of record, and by George E. Marquette in person, and as agent of Raymond, Theodule and Bartholomew Kertson, three of the brothers of the deceased, and by the rest of the heirs, by Allen & Reed, as their attorneys. At the same time a one-fourth interest in or part of the above mentioned Mary Sweeney legacy, amounting to \$625.65, was assigned by Allen & Reed for the benefit of George Marquette and Raymond, Theodule and Bartholomew Kertson, all of whom acknowledged and approved of the assignment in writing. On the previous day, to wit, April 30, 1903, all the four last named persons had executed, the first of them by his own hand, and the other three by Marquette, as their agent, an express ratification in writing of all former agreements and contracts entered into between Allen & Reed and all or either of said persons. At or about the same time Raymond, Theodule and Bartholomew, each by quitclaim deed, conveyed his interest in the land to Marquette, and the latter executed a mortgage thereon to secure a promissory note for \$2,700 to the attorneys of himself and his grantors. And at the same time, also, each of the four persons last named received

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from Rubendall written assignments of the several interests of each in the estate of the deceased formerly acquired by said Rubendall. Subsequently the appeal in the probate proceeding was abandoned, and the administrator with the will annexed paid to Lafleur the stipulated sum of \$6,000 and interest, and obtained his receipt therefor. The affairs of the estate were thereupon fully administered upon and settled.

This action was begun in February, 1904, by Theodule Kertson in behalf of himself and Raymond and Bartholomew, all brothers of the deceased, and George E. Marquette, sole issue of a deceased sister of the deceased, claiming that they were the sole heirs at law of the deceased to the exclusion of all others claiming to be such, for the reason that the latter were nonresident aliens and excluded by the statutes of this state, and alleging the invalidity of the deed from the deceased to Lafleur and of the conveyance from Lafleur to Rubendall, on the grounds that the latter instruments were without consideration, and were executed with notice that the former was void, both because it was testamentary in character and because of the alleged mental incapacity of the deceased at the time of its execution, and praying to have said instruments canceled and set aside, and title to the entire tract quieted, one undivided fourth in each of themselves in severalty. Raymond and Bartholomew Kertson and Marquette were made nominal defendants, and filed answers and cross-petitions, alleging substantially the same matters contained in the petition of the plaintiff. Allen & Reed filed answers and cross-petitions, alleging their employment by written contract with the plaintiff and cross-petitioners, already named, and others claiming to be heirs at law of the deceased, for the purpose of prosecuting and defending suits, actions and proceedings at law and in equity necessary for testing and determining the validity of the will and of the conveyance by the deceased to Lafleur, and for collecting and preserving the estate of the deceased, with full authority to compromise and settle any such litiga-

tion in such manner as to them should seem proper, and stipulating that they should be entitled to demand and receive or retain, in consideration of their services in the premises, an undivided one-half of all of said estate they should thus be able to obtain or recover. And they further alleged that the said conveyance of an undivided one-half of said tract of land, pursuant to the stipulations before mentioned, to the said Rubendall in trust for the said Allen & Reed was made in consideration of said stipulations and agreements and of the services thereby contemplated and rendered thereunder.

An explicit analysis of the 800 pages of the pleadings and evidence would serve no useful purpose. The only important issue presented is founded upon the contract of employment entered into by the appellants and Allen & Reed. This contract and the subsequent ratification agreement of April 30, 1903, appellants contend is not binding upon them because, it is alleged, they were deceived and misled into signing them. The evidence tends to disclose that prior to April 30, 1903, appellants doubted the integrity of Allen & Reed. They were suspicious that they had been imposed upon in the agreement previously made. Being thus apprehensive that the attorneys had perpetrated a fraud upon them, Marquette, armed with authority to represent Raymond, Theodule, and Bartholomew Kertson, came to Madison county and employed resident counsel of his own selection, who were in no way identified with Allen & Reed, and who, it appears, were industrious and faithful in their employment. whatever facts, if any, were withheld from appellants when the original contract of employment was entered into were known to Marquette on April 30, 1903. A discussion, therefore, of the original transactions we deem unnecessary. Suffice to say that on its face there is no appearance of fraud or unconscionable or unprofessional conduct on the part of the attorneys. And the record discloses that they rendered valuable services, and the com-

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pensation contracted for is not alleged nor proved to be excessive.

After Marquette had investigated the matter and employed counsel as above stated, acting for himself and his uncles, he signed the following agreement: "Madison, Neb., April 30, 1903. Upon due consideration and being fully advised in the premises of all facts and circumstances respecting the matter of the estate of George S. Kertson, deceased, I, George E. Marquette, for and on behalf of myself and my uncles, Raymond Kertson, Theodule Kertson and Bartholomew Kertson, for whom I am duly authorized to act, do hereby ratify and confirm the written contract heretofore entered into between said firm of Allen & Reed and the undersigned George E. Marquette, and also the contracts respectively entered into between Allen & Reed and Theodule Kertson, Raymond Kertson and Bartholomew Kertson, respectively. (Signed) George E. Marquette. Raymond Kertson, by George E. Marquette, his agent. Theodule Kertson, by George E. Marquette, his agent. Bartholomew Kertson, by George E. Marquette, his agent. Witness: M. B. Foster."

Appellants further contend that Marquette had no authority to sign the above agreement in their behalf and that it was signed in ignorance of the true state of affairs. This contention is incredible and is contradicted by the full history of the transaction. Contemporaneous with the agreement above set out, Marquette had, while acting in the same capacity, entered into other arrangements and contracts under which he and those for whom he was acting received money and property which they still retain. It is apparent from the record that Marquette's visit to Madison county was for the purpose of investigating the conduct of Allen & Reed, and in addition thereto to bring about a settlement of the estate. The several contracts signed by him promoted these objects, and the administration of the estate proceeded, and a settlement of the entire matter was effected, as far as the litigation then pending or threatened and the probate proceedings were con-

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cerned. By their ratification of the former proceedings they themselves wholly exonerated Allen & Reed, and the attack they now make is wholly unjustifiable.

The district court found the issues joined in favor of the defendants Allen & Reed, adjudging them to have a first and prior lien upon the tract of land to the amount of one-half the value thereof, and ordered the tract sold for the purposes of partition, and the proceeds distributed among the several persons, lienors and heirs at law of the deceased, in manner and amounts specifically determined by the decree. Lafleur filed a cross-bill in which he prayed to be released from his covenants of warranty in the deeds executed by him to Rubendall, and it was so adjudged, rightly so, we think, because, as the matter eventuated, he served merely as a conduit through which the title passed from the deceased to the heirs at law of the latter, Lafleur, as the settlement established and as the court in effect adjudged, never having had any beneficial interest therein. Other parts and dispositions of the decree which are not in controversy and which are not affected by this decision need not be here set forth.

We are satisfied that the judgment is fully sustained by the pleadings and the evidence, and recommend that the judgment be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JAMES E. LEYDA, APPELLANT, v. ISHAM REAVIS, APPELLEE.

FILED DECEMBER 7, 1906. No. 14,495.

Trust Funds: PETITION: SUFFICIENCY. In an action to subject a trust fund to the payment of services rendered, it is necessary to allege not only the existence of the trust fund, but that some amount remains due for such services.

APPEAL from the district court for Richardson county:
ALBERT H. BABCOCK, JUDGE. *Affirmed.*

E. Falloon, for appellant.

John L. Webster, contra.

EPPERSON, C.

On August 12, 1903, plaintiff Leyda, an attorney at law, filed a petition in the district court for Richardson county in words and figures following: "James E. Leyda, plaintiff, complains of the defendant, Isham Reavis, and for cause of action alleges that on the 15th day of November, 1895, the defendant, Isham Reavis, entered into a contract with William Deroin, by the terms of which contract the said William Deroin leased to Isham Reavis for a period of five years the east half of the northeast quarter of section 9, town 1, range 17, in Richardson county, Nebraska; that some time afterwards, about the 9th day of January, 1896, the defendant, Isham Reavis, sublet said farm to one Peter Boltz; that the object in making said lease and sublease was to procure money to make a defense for the said Deroin, who had been informed against in the district court for Richardson county, Nebraska, and charged with shooting with intent to kill; that at this time C. F. Reavis was the county attorney of Richardson county, Nebraska, and as the public prosecutor was charged with the duty of, and did, prosecute said William Deroin on said charge; that said C. F. Reavis was a son of the defendant, Isham Reavis, and the defendant, not wishing to appear as a defending attorney in said case, in which his son was acting as a public prosecutor, requested the plaintiff, James E. Leyda, and E. W. Thomas to appear in the district court during the latter part of the year 1895 and look after the defense of the said William Deroin; that at the time said case of *State of Nebraska v. William Deroin* was pending in the district court for

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Richardson county, Nebraska, during the years 1895, 1896 and 1897, the plaintiff and E. W. Thomas did appear, at the request of the defendant, and make the defense for the said William Deroin on said charge; that said Isham Reavis collected, by virtue of the said lease, from Peter Boltz the sum of \$450 as rent money on said land, and which money was to be used in the payment of fees to the plaintiff and E. W. Thomas for defending the said Deroin on said charge of shooting with intent to kill; that the said defendant, Isham Reavis, had no interest in the said \$450, but held the same as naked trustee for the use and benefit of E. W. Thomas and this plaintiff; that the defendant, disregarding his duties as a trustee in this matter and for the purpose of cheating and defrauding this plaintiff out of his just proportion of said \$450, concealed from this plaintiff all knowledge of said lease and sublease and his collection of said \$450, and this plaintiff never knew until within about 30 days before this suit was brought that said lease and sublease had been made for his benefit, or that said Isham Reavis, as trustee, had collected said \$450. A copy of said lease and sublease are hereto attached, marked exhibits 'A' and 'B,' and made a part thereof. Said trustee and defendant, Isham Reavis, has never paid the plaintiff his share of said \$450, or any part thereof. Wherefore, plaintiff prays that there may be an accounting had between plaintiff and defendant; that defendant be held a trustee of said fund, and that plaintiff have and recover from said defendant the sum of \$225, being one-half the amount that said Isham Reavis collected as trustee of said fund, together with interest thereon at 7 per cent. per annum from the 9th day of January, 1896, and costs of suit."

That part of the original lease which is material to this action is as follows: "Said sum to be paid in the manner hereinafter stated, to wit, in services as attorney in defending said Deroin against two criminal charges in the district court for Richardson county, also in the supreme court of Nebraska. That part of the sublease which is ma-

terial is as follows: "The said Peter Boltz is to pay to his lessor, Isham Reavis, for the use of himself and associates in the defense of William Deroin, as mentioned in said original lease to which this is attached, the sum of \$450 as their attorney fees for defending said Deroin against said charge in the district and supreme courts to a final issue, said Deroin being defended by Isham Reavis, E. W. Thomas and J. E. Leyda; and it is agreed by the parties that after said attorney fees are paid the said Peter Boltz is to pay the remainder of the rent for the term to William Deroin."

Defendant demurred to this petition on the ground that the petition did not state facts sufficient to constitute a cause of action.

It appears from the petition that defendant employed plaintiff to appear in court and assist in the defense of Deroin. Deroin did not employ plaintiff. Defendant, as far as the petition discloses, being the only person liable to plaintiff, was not guilty of fraud by his subsequent conduct. The lease from Deroin to defendant does not create an express trust in favor of plaintiff, or any other person. It simply recites that the rental is to be paid to defendant for services as attorney in defending Deroin. It cannot be said that the sublease was made for plaintiff's benefit. The excerpt therefrom *supra* was a declaration on the part of defendant as to what he then intended to do with the rental, but it was not necessary for the creation of a valid lease. Defendant's lessee was not in privity with plaintiff, and the declaration was no more than a statement of what defendant then intended to do with the funds of which he had control; and, for aught that appears in the petition, all the rent money may have been paid to Thomas. If so, it is not made to appear that plaintiff was wronged thereby. Plaintiff assumes that the making of the lease and his appearance in defense of Deroin, at the request of defendant, entitled him to recover one-half of the rent collected. In our opinion, the most serious trouble with plaintiff's petition is the omis-

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sion of certain allegations necessary to complete a cause of action. Plaintiff does not allege the value of his legal services, nor that he was not paid from sources other than the alleged trust fund. It was not sufficient for plaintiff to allege the existence of the trust fund, but he should have alleged that there was due him some amount which the fund was created to secure.

We think the court rightly sustained the demurrer, and recommend that its judgment be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

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CHARLES ALBERTS, APPELLEE, v. WILLIAM HUSENETTER,
APPELLANT.

FILED DECEMBER 7, 1906. No. 14,504.

1. **Damages: EVIDENCE.** In an action for damages to growing trees, evidence showing the effect the destruction of the trees had on the value of the land is admissible when the nature of the trees destroyed is such that they have no value, except with reference to and as a part of the real estate.
2. **Trial: DISCRETION OF COURT.** It is discretionary with the trial court to permit the jury to view property which is the subject of litigation.
3. **Evidence examined, and held** that the damages awarded were not excessive.

APPEAL from the district court for Brown county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

J. A. Douglas and A. W. Scattergood, for appellant.

L. K. Alder, contra.

EPPERSON, C.

This action was brought to recover damages for the negligent burning of plaintiff's cottonwood and mulberry trees. Plaintiff recovered judgment in the court below, and defendant appeals.

The most important question argued pertains to the admission of evidence as to damages sustained. Plaintiff as a witness in his own behalf was asked: "Now what effect does it (the grove) have upon the value of the land for the purposes for which you were using or preparing it, as a ranch?" Another witness was asked: "Now, can you fix the value of those trees in the grove there, standing there as growing timber, taken in connection with the effect they would have on the value of the land just prior to the fire?" Questions of like import were asked of other witnesses. Defendant's objections to these questions were overruled. The answers were favorable to plaintiff, and prejudicial if erroneous. This question was before the court in *Kansas City & O. R. Co. v. Rogers*, 48 Neb. 653. During the trial of that case a witness testified to the amount of damages to his trees. On cross-examination he was asked to give the basis of his valuation, and answered: "Because they were worth that to me as ornamental trees." "Q. What are the elements that enter into the estimate that you have made? A. Adding to the value of the land and the farm." It was held that a motion to strike out this testimony as to value was properly overruled. In the case at bar, the elements making up the witnesses' estimates of the damages were shown by the direct instead of the cross-examination. Otherwise, the two cases as to this point are similar. We can see no difference in principle. Plaintiff herein did not attempt to recover for damages to his land, nor to measure his damages by the difference in the value of the land before and after the fire. The witnesses testified to the value of the damaged trees before the fire and their value afterwards. In arriving at the value of the trees, it is

shown by the evidence objected to that they considered the trees valuable because they added to the value of the land. They were of little or no value when severed from the land. In other words, the wood or lumber, when severed, could not be practically utilized. This being true, the trees would have no market value. But it does not follow that they were worthless. In this state there is little natural timber, and in the western portion of the state but little timber of any kind. Brown county is in the territory unfavored by nature in this respect. Trees have a value independently of their intrinsic worth as wood or for other purposes for which they may be practically utilized. They are ornamental. They furnish shade in the summer and shelter in the winter. When thus considered, their value as growing timber must be estimated with reference to their situation as to the land or farm upon which they stood. In *Union P. R. Co. v. Murphy*, 76 Neb. 545, this court held: "The measure of damages to growing trees, having no value for purposes of transplanting, is the value of the trees with reference to the land in the situation in which they stood prior to the damage, less their value for practical purposes afterwards." If we cannot consider the trees with reference to the land, and as affecting the value of the land, then, under the case made, we must hold that plaintiff was not damaged by the burning of the trees. Defendant contends that the *Rogers* case is contrary to *Fremont, E. & M. V. R. Co. v. Crum*, 30 Neb. 70, wherein it was held: "The measure of damages is the amount of damage the trees and timber suffered by reason of the fire, and not the difference in the value of the land with standing trees and timber before the fires and afterwards." That rule was adhered to in *Missouri P. R. Co. v. Tipton*, 61 Neb. 49, and the same measure of damages applied to fruit trees. A discussion of these cases is unnecessary. The rule there followed does not preclude evidence relating to the effect the destruction of trees would have on the value of the land when the nature of the trees destroyed is such that

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they have no value, except as they exist as growing timber with reference to and as a part of the real estate.

2. After plaintiff's evidence was introduced the court, on motion of the plaintiff, permitted the jury to view the grove. Defendant alleges error in this, contending that, if justified at all, the visit of the jury should have been after the introduction of all the evidence. Under the provisions of section 284 of the code, the viewing of property by the jury is entirely within the discretion of the trial court, and unless an abuse of discretion is shown the judgment will not be reversed.

3. Defendant's final contention is that the verdict is excessive. Several witnesses placed the value of the property destroyed at \$1,000. Others at a less figure. We cannot say that \$250 was excessive.

The judgment should be affirmed, and we so recommend.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FARMERS & MERCHANTS IRRIGATION COMPANY, APPELLANT,
v. PHOEBE A. BRUMBAUGH, APPELLEE.

FILED DECEMBER 7, 1906. No. 14,530.

Fraudulent Conveyances: EVIDENCE. In an action to set aside an alleged fraudulent conveyance, it appeared that the debtor, prior to the date of the judgment sought to be enforced, was indebted to various parties in large sums; that it was then agreed between the debtor and his wife that if she should pay the indebtedness, which at that time exceeded the value of the land, she should have a deed to the premises. It also appeared that the debtor's wife had advanced most, if not all, of the purchase price of the farm; that the wife, in pursuance of the agreement, paid the indebtedness of her husband from her own funds in an amount

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exceeding the value of the land at the time the agreement was made, and secured a deed to the premises; that the creditor at the time of extending credit to the husband had full knowledge of the contract of the wife to purchase. *Held*, That the wife's deed could not be set aside by the creditors of the husband as a fraudulent conveyance.

APPEAL from the district court for Dawson county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed*.

E. A. Cook, for appellant.

Warrington & Stewart and H. M. Sinclair, contra.

EPPERSON, C.

The plaintiff company (appellant) brought this action against appellee, Phœbe A. Brumbaugh, and John H. Brumbaugh, her husband, alleging, in substance, that on November 5, 1903, plaintiff recovered judgment against John H. Brumbaugh in the county court of Dawson county, and later filed a transcript in the district court; that execution was issued and returned *nulla bona*, and that John H. Brumbaugh is insolvent; that on May 17, 1890, the Union Pacific Railroad Company conveyed by warranty deed to John H. Brumbaugh certain land in Dawson county, and on July 12, 1893, Brumbaugh and wife conveyed the land to H. V. Temple as security for money loaned defendants and for no other purpose; that appellee knew of the indebtedness of John H. Brumbaugh to appellant and knew that the same had not been paid; that on July 24, 1902, Temple, by quitclaim deed, conveyed the premises to appellee at the request of her husband, with the intent on the part of the said John H. Brumbaugh of defrauding this plaintiff; that at the time said land was conveyed to appellee she knew of the indebtedness of John H. Brumbaugh to plaintiff, and knew the same had not been paid, and knew that her husband had no other property from which said indebtedness could be paid. Plaintiff prayed that the conveyance

of Temple to appellee be set aside and the land decreed to be the property of John H. Brumbaugh, and that appellee be decreed only to have a lien thereon for money advanced by her for said John H. Brumbaugh, and for such other relief as may be just and equitable. Plaintiff introduced testimony tending to support the allegations of his petition.

Appellee alleged and proved that she was the wife of John H. Brumbaugh; that she and her husband came to Lexington, Nebraska, in 1884; that she has been engaged in business for herself from that date to the present time; that she carried a \$5,000 stock, and had purchased several residence properties with her own funds; that she advanced from her own funds the purchase price of the farm in question, and paid for the improvements thereon; that her husband became indebted to the bank of which Temple was cashier, and also to other parties, in large sums, and the land was deeded to Temple as security; that in January, 1897, an oral agreement was entered into between appellee and her husband, by the terms of which it was agreed that appellee should pay off her husband's said indebtedness and have the land; that a written contract was made by appellee with Temple, whereby Temple agreed to convey the land to appellee when the indebtedness to the bank was fully paid. It is undisputed that, in pursuance of this understanding between the parties, appellee paid from her own funds more than \$8,525.73 of her husband's said debts, and paid the taxes and placed improvements on the land, and thereupon Temple transferred the premises to her. The evidence of both parties discloses that in 1897, when the contracts above referred to were made, the land was worth only \$4,000 or \$5,000. In conformity to the prayer of appellee's answer, the court dismissed plaintiff's action and quieted the title to the land in appellee. Plaintiff appeals, contending that the decree is not sustained by the evidence and is contrary to law.

We are convinced that the learned trial judge reached the only conclusion warranted by the evidence. It is clear

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that Mrs. Brumbaugh advanced most, if not all, of the purchase price of the land, and paid \$8,525.73, and more, from her own funds for the deed from Temple to herself. The premises, therefore, are not subject to the payment of the husband's debts created after Mrs. Brumbaugh purchased the land. Again, it appears that Temple held the title as security, and had entered into the written contract to convey to appellee; that Temple was an officer of the plaintiff company, and, as such, in 1900 took from Brumbaugh the note upon which plaintiff obtained the judgment here sought to be enforced. We must conclude, therefore, that plaintiff extended credit to the husband with full knowledge of the appellee's title to the land, and thereby the question of fraud—the foundation of plaintiff's action—is eliminated from the case.

The district court was clearly right in dismissing the action and quieting title in appellee, and we recommend that the judgment be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOHN FLANAGAN, APPELLANT, V. WILLIAM C. FABENS
ET AL., APPELLEES.

FILED DECEMBER 7, 1906. No. 14,533.

1. **Review: EVIDENCE.** The verdict of a jury based upon conflicting evidence will not be set aside by this court when sustained by competent evidence.
2. ———: **HARMLESS ERROR.** Rulings of the trial court upon the reception and rejection of evidence, *held* without prejudicial error.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

John T. Cathers, for appellant.

Howard B. Smith and Charles Battelle, contra.

EPPERSON, C.

November 16, 1870, William C. Fabens became the owner of block 9, in Boyd's addition to the city of Omaha, and has since held the record title thereto, except two lots which were sold in 1899. John Flanagan brought this action in ejectment claiming to have acquired title to all of block 9 by adverse possession from 1868 to 1899, at which time he alleges he was unlawfully ejected therefrom. Trial was had resulting in a verdict and judgment for defendants and plaintiff appeals.

1. Plaintiff now contends that the verdict is not sustained by the evidence. He testified that he farmed the land in controversy from 1868 to 1899. His testimony was corroborated by several witnesses, especially as to the use of the land subsequent to 1880. On the other hand, defendant and his witnesses directly contradicted plaintiff's testimony as to the possession of the land, except, as to one or two years. Manifestly the jury's finding on this conflicting evidence cannot be disturbed by this court.

2. While plaintiff was on the stand, the following questions were asked: "Q. State whether or not you were in possession of block 9, which is the land in controversy here? Q. Did you all of that time have the exclusive use and occupancy of that land?" Defendants objected as incompetent, immaterial, irrelevant, and calling for the conclusion of the witness, and the court sustained the objections. The first question was indefinite as to time and an answer thereto would subserve no useful purpose. The last question was, perhaps, calling for the conclusion of the witness, and was for that reason subject to objection. However, further examination of this witness brought out the facts sought, and the ruling of the court was without prejudice. Other assignments, challenging

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the court's rulings on the reception and rejection of evidence, are called to our attention, but, upon examination, are found to be without merit, and do not require discussion.

No prejudicial error is disclosed in this record, and we recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA ET AL., APPELLEES, V. SEVERAL PARCELS
OF LAND ET AL., APPELLANTS.

FILED DECEMBER 7, 1906. No. 14,552.

Cities: IMPROVEMENTS: PETITION. The evidence examined, and held insufficient to support a finding that appellant Gibson was paid a consideration for signing a petition for local improvements.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Reversed.*

A. H. Murdock, for appellants.

W. O. Lambert, contra.

EPPERSON, C.

This is a suit under the scavenger act to foreclose certain special assessments levied by the city of South Omaha against the property of L. C. Gibson. It is conceded that the special tax is void, and the only point at issue is whether Gibson is estopped to question the validity of the assessment.

The lower court found that Gibson was the owner of

the property described in the petition, and that he was paid a consideration for signing the petition and was estopped from questioning the validity of the tax. The record discloses that Cash Brothers contracted with the city to grade the streets in question, and on November 2, 1899, lodged with the city clerk the following order: "South Omaha, Nebraska, Nov. 2, 1899. To the City Clerk of the City of South Omaha, Neb. Dear Sir: You are hereby authorized and directed to issue and deliver to L. C. Gibson a warrant on grading district No. 42 (being for the grading of 22d st. between N & O sts. in the city of South Omaha) for a sum equal to the amount of grading tax assessed and made a lien on the east eighty (80) feet of lots one (1) and two (2), in block one hundred and twelve (112), and the north $\frac{1}{2}$ of lot three (3), in block one hundred and twelve (112), South Omaha, Nebraska. The refunding to him of a sum equal to the tax (to be assessed against the above described lots owned by him) for the grading of the said street as above specified is a consideration offered to him by me for his signature to the petition to grade the said street, which said signature to grade it is understood will be withdrawn unless the grading of said street in said district shall be without cost to him. Cash Bros. Witness, R. A. Carpenter." It further appears that a warrant was issued to Cash Brothers, of which the following is a copy: "\$360.90. City of South Omaha, State of Nebraska. Amount levied \$———. Am't. issued. \$375.90. No. 4. South Omaha, Neb. 4-10-900. City Treasurer: Pay to Cash Bros. or order, three hundred and sixty 90-100 dollars for grading 22 N to O and charge to the account of G. Dist. No. 42 fund. A. R. Kelly, Mayor. S. C. Shrigley, City Clerk. (Seal)." Stamped on the face of the warrant are the following words and figures: "Assignment to R. A. Carpenter, City Clerk." Paid Apr. 10, 1900. F. A. Broadwell, City Treas., South Omaha, Neb." Stamped on the back thereof are the following words and figures: "Presented and registered for payment, Apr. 10, 1900. Not

paid for want of funds. F. A. Broadwell, City Treas. Reg. No. —, page 186." There was also written in ink across the back of the warrant: "L. C. Gibson."

No other evidence was introduced tending to show that Gibson received a consideration for signing the petition. It does not appear that the order above referred to was delivered to Gibson, or acted upon by him. The order was dated prior to the awarding of the contract to Cash Brothers, and how it was foreseen that they would be the successful bidders is not disclosed. There is no evidence that the warrant was delivered to Gibson, nor that he received the proceeds therefrom. Neither was it shown that the signature "L. C. Gibson" on the back of the warrant was in the handwriting of Gibson, nor that Cash Brothers indorsed the warrant. We are unable to draw the inference from the evidence contained in this record that Gibson received a consideration for signing the petition, and hence decline to discuss the question of estoppel at this time. The evidence under review being "written evidence," the finding of the lower court thereon does not have the binding effect upon this court claimed for it by appellee's counsel. *Faulkner v. Simms*, 68 Neb. 299. The evidence, as now presented, is insufficient to sustain the finding that Gibson was estopped from questioning the validity of the special assessment, and we recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

GEORGE M. NICHOLSON, APPELLEE, v. CITY OF SOUTH
OMAHA, APPELLANT.

FILED DECEMBER 7, 1906. No. 14,508.

1. **Cities: ACTION FOR DAMAGES.** Section 107, ch. 17, laws 1903, does not require the presentation to the city council of a claim for damages for a personal injury sustained in consequence of a defective street or sidewalk of the city, and an appeal from the action of the council thereon. An original action may be maintained therefor in the district court.
2. **Negligence: QUESTION FOR JURY.** It is not the plaintiff's knowledge of the defect in a walk or street that precludes his recovery, but his want of such care as a prudent man would exercise in view of the danger. This is usually a question for the jury.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JR., JUDGE. *Affirmed.*

W. C. Lambert and S. L. Winters, for appellant.

T. J. Nolan, contra.

DUFFIE, C.

The plaintiff and appellee, George M. Nicholson, brought this action against the city of South Omaha to recover damages alleged to have been sustained on October 31, 1903, in consequence of the defective condition of a sidewalk extending along the east side of Thirteenth street between M and N streets in said city. A verdict was returned in favor of the plaintiff below for \$500, and from a judgment entered thereon the defendant city has appealed. It is one contention of the city that the court had no jurisdiction to try the case; that by the provisions of section 107, ch. 17, laws 1903, the claim was one which had to be presented to the city council for its action, and an appeal taken from the finding of the council to the district court if the claimant was not satisfied with the amount allowed him. A construction of that section

is not free from difficulty, but careful consideration of the question leads us to believe that the claimant might reach the district court by an original action commenced therein and was not driven to taking an appeal from the action of the council. So far as necessary to an understanding of the question involved, the provisions of the section are as follows: "All claims against a city, including unliquidated claims for damages to person or property, must be presented in writing, with a full account of the items, verified by the oath of the claimant, his agent, or attorney, that the same is correct, reasonable and just, and no claim shall be audited or allowed unless presented and verified as provided for in this section and read in open council. All claims against a city must be filed with the city clerk, and when the claim of any person against the city is disallowed in whole or in part by the city council, such person may appeal from the decision of said city council to the district court of the same county by causing a written notice to be served on the city clerk of said city within twenty (20) days after making such decision." Then follows provisions for taking the appeal and getting the record into the district court. After providing the steps necessary to an appeal, the section continues: "No city shall be liable for damages arising from defective streets, alleys, sidewalks, public parks, or other public places within such city, unless a notice in writing of the accident or injury or damage complained of, with a statement duly verified, by the claimant, his agent, or attorney, setting forth the nature and extent of such injury or damage, and of the time when and the place where the same occurred, shall be proved to have been filed in the office of the city clerk within twenty (20) days of the date of the injury or damage complained of, and it is hereby made the duty of the clerk to keep a record of such notice showing the time when and by whom such notice was given and describing the defect complained of, and report the same to the city council at its next meeting: Provided, that in all cases of claims for

injuries to the person, the person claiming to have been injured shall, at any time after giving notice of such injury, be subject to a personal examination by the city physician and such other physician as the city attorney may designate, or by either of them, for the purpose of ascertaining the extent and character of the alleged injury, and a refusal to submit to such examination shall bar any action and all right to recover damages thereon against the city. All actions against such city for damages or injury to person or property hereinafter sustained by reason of the negligence of such city must be brought within six (6) months from the date of sustaining the same."

Relating to claims founded on contract, express or implied, whether the damages be liquidated or unliquidated, the presentation of such claims to the city council for its action, and an appeal therefrom, is clearly contemplated by the first part of the section. So, too, we think that on claims sounding in tort, in those cases where the claimant might maintain an action against the city at common law, a presentation to the city council, and an appeal from its action, is the only way of reaching the district court. The latter part of the section, however, seems to contemplate that class of actions not known to the common law and given to a party by statute, viz., damages for personal injuries arising from the neglect of the city to keep its streets, alleys, sidewalks, public parks or other public places within the city in proper repair and safe condition for use by the public. So far as this class of actions is concerned, there is no doubt that, in order to recover, the claimant must bring himself within every provision of the statute giving him a right of action. The common law did not recognize such a claim. The legislature, in giving a right of action therefor, may impose upon the injured party any condition which it thinks proper. One condition is that he shall, within 20 days, give notice in writing to the city council of the nature and extent of his injuries, and of the time when and the place where the

injury occurred. Another is that he shall submit himself to an examination by the city physician or a physician named by the city attorney; and a third is that his action for damages shall be instituted within six months. It is a general rule in the construction of statutes that each of its provisions shall, if possible, be given effect. There is no need of limiting the time within which an action must be commenced, if the only way of reaching a court is by appeal from the city council; and it is hardly permissible to say that a statute limiting the time for commencing an action does not contemplate a right to bring an action by the party thus limited. It seems to us that the statute contemplates two classes of claims: One where action must first be had by the city council and an appeal taken by the claimant, if not satisfied with the allowance made; and the other for damages sustained in consequence of negligence on the part of the city for failure to keep its streets and other public places in proper repair, in which cases the injured party may commence directly in the courts of the state, first giving notice of the time, place and extent of his injury. This conclusion is somewhat strengthened by the general rule that the jurisdiction of superior courts cannot be taken away, except by express words or by necessary or irresistible implications. 23 Am. & Eng. Ency. Law (1st ed.), 406, 407, and cases cited. Another circumstance, while not of controlling weight, leads to the same conclusion. At the next session after the enactment of the section in question, the legislature, with the evident purpose of making plain the proceedings to collect claims against the city, amended the section so that it now reads: "All claims and demands against the city, whether of contract or in tort, must be presented in writing and filed with the city clerk thereof. When disallowed, in whole or in part, the city clerk shall notify the claimant in writing, his agent or attorney, within five days thereafter. The notice may be served by any sheriff or his deputies, by any policeman or constable, and if the claimant is a nonresident, the clerk

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shall notify him by mail. The claimant may appeal from the order or decision of the city council by causing a written notice to be served upon the city clerk within twenty days after the order or decision, of his intention to appeal." The statute then defines the steps necessary for perfecting the appeal, and provides for an appeal by a taxpayer of the city who thinks the allowance too large. It is then further provided as follows: "All claims and demands against the city, except those for damages to property, or for the taking of property for public purposes, and those for injury to the person or property on account of negligence and those for fixed salaries and compensation of the officers and employees of the city, must be presented as aforesaid giving a full, and correct account of the items sworn to by the claimant, his agent or attorney, that the same are full, correct, complete, reasonable and just." Laws 1905, ch. 20, sec. 107.

It will be observed from this reading of the statute as amended that claims for the taking of property for public use and those for injury to the person or property on account of negligence are not required to be presented to the city council, and that original action may be brought against the city in the district court notwithstanding the broad language of the first part of the statute requiring all claims and demands, whether of contract or in tort, to be so presented. The uniform course of legislation in this state has been to allow original suits to be brought against municipalities in cases of personal injury, and we cannot now call to mind any act of the legislature denying to one having a cause of action against a municipality for a personal injury received the right to institute an action in court for his damages without first presenting his claim to the governing body of the municipality for allowance. The right of one suffering from a personal injury to present his claim to the city council for allowance cannot be disputed, and if he does so, then, in order to recover a greater amount than allowed by the council, he must, under the statute now in force, proceed by way of appeal to the

district court. Relating to such procedure the statute now reads: "When any such claim is disallowed, in whole or in part, * * * the claimant may appeal from the order of the council in the manner hereinbefore provided; and failing to appeal as hereinbefore provided, he shall not be entitled to recover thereon in any court on any claim, an amount in excess of the allowance made him by the council." This clause of the statute clearly recognizes the right to commence an original action in the district court after a claim has been disallowed in part, but limits the recovery to the amount allowed by the council. If the claimant prefers a judgment of the court rather than an order of the council allowing his claim, the statute, we think, still contemplates his right of action to recover such damages as he may prove, not, however, exceeding that allowed by the council; his only advantage being to change his claim against the city to the form of a judgment instead of an allowed claim.

A second claim made by the city is that the plaintiff himself was negligent, and that contributed directly to his injury. The accident happened in the evening after dark. There was no street light in the near vicinity of the place where the accident is claimed to have occurred. The plaintiff is an old man and somewhat enfeebled. The evidence for the plaintiff shows that the walk had been defective for some months. It shows, further, that the plaintiff himself knew of the defective condition of the walk, and had passed it on numerous occasions, as it was the only passable way to reach the city from the place of his residence during bad weather and a muddy condition of the ground. He frankly states that on the night in question he was not thinking of the dangerous condition of the walk at the time he approached it, that his mind was absorbed by a matter of business upon which he had been engaged during the day and which he was anxious to conclude. He does not claim that his attention was diverted by any passing object or by anything taking place which distracted his attention. Under this state of the evidence

the city asked the following instruction: "You are further instructed that the testimony of the plaintiff shows that at the time of the alleged injury he was not thinking of the defect in the sidewalk, and was making no effort to avoid stepping therein; that his attention was not elsewhere attracted by any object or circumstance, but was simply occupied by his own thoughts, and that he was not deceived or misled by darkness as to the whereabouts of the defect; that the plaintiff was at that time not using the care and caution required of him, and that he was guilty of contributory negligence and is not entitled to recover in this case, and your verdict will, therefore, be for the defendant."

We think this instruction assumes as a fact one element that was not clearly shown and which was properly left to the jury. It is not at all clear, as stated in the instruction, that the plaintiff was not deceived or misled by darkness as to the whereabouts of the defect. On his cross-examination the question was plainly put to him whether he could have seen it if he had been thinking about it, and his answer is: "It was dark; I do not know." The fifteenth instruction of the court gave to the city every advantage to which we think it was entitled regarding the plaintiff's knowledge of the condition of the walk and the care required of him to avoid an injury. As stated in many cases, it is not the plaintiff's knowledge of the defect in a walk or street that precludes his recovery, but it is his want of such care as a prudent man would exercise in view of the danger. This is usually a question which must be left to the jury, and it is only in a clear case that the court will, as a matter of law, direct a verdict in consequence of contributory negligence on the part of the plaintiff. The case appears to have been carefully and fairly tried, and, while we would not have been dissatisfied with a verdict for the defendant, we cannot say that any errors of law prejudicial to the city are shown by the record.

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We recommend an affirmance of the judgment.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ALPHILDA NELSON, APPELLEE, v. WILLIAM H. SCHMOLLER
ET AL., APPELLANTS.

FILED DECEMBER 7, 1906. No. 14,526.

1. **Justice of the Peace: JUDGMENT: ENTRY.** The entry of a judgment by a justice of the peace, although informal and not technically exact, is sufficient as against a collateral attack, if his docket entry, taken as a whole, shows that he reached and entered a conclusion as a final determination of the action then pending before him. *Fowler v. Thomsen*, 68 Neb. 578.
2. **Conversion.** The plaintiff in a replevin action cannot be held for conversion of the property taken on the writ pending a trial of the cause, unless he has sold or otherwise appropriated the property, and such an action will not lie after judgment finding him entitled to the possession on account of a special ownership, unless he has done some act in relation to the property inconsistent with the right conferred on him by the judgment.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Reversed.*

A. S. Ritchie and Charles L. Fritscher, for appellants.

John F. Stout and A. C. Wakeley, contra.

DUFFIE, C.

December 6, 1899, Schmoller & Mueller, the appellants, commenced an action in replevin in justice court against Alphilda Nelson, the appellee, to recover possession of a certain piano. The case was tried January 15, 1900, and

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the following judgment entry made by the justice: "Plaintiff and defendant appeared by their attorneys. A. C. Mueller and W. H. Schmoller, plaintiffs, and Charles E. Adolf, bookkeeper of plaintiffs, having been duly sworn and testified, after consideration the court finds the right of possession of property in controversy to the plaintiffs and assess his damages for the tention of same at one cent and the defendant pay costs. Witness my hand this 15th day of January, 1900. William Alstadt, Justice of the Peace." Mrs. Nelson appealed to the district court, where, as appears from a stipulation of parties, the appeal on plaintiff's motion was dismissed and the justice court ordered to proceed with the execution of judgment. Thereafter, and on December 7, 1903, this action was commenced to recover from Schmoller & Mueller the value of the piano in controversy, upon the theory that the same had been converted by the defendants. The answer justified the taking of the piano by the defendants, alleging that prior to such taking they leased the piano to the plaintiff, and that title thereto and ownership thereof had at all times been in the defendants; that on December 6, 1899, the defendants commenced suit in replevin to recover possession of the property, and that on January 15, 1900, on a trial before Justice Alstadt, a judgment was rendered adjudging the right of possession and right of property to be in Schmoller & Mueller; that an appeal from said judgment to the district court had been dismissed, and the case remanded to the justice court, and the judgment of the justice had ever since remained in full force and effect. After the plaintiff had introduced her evidence, which included the judgment entry above quoted, together with a full transcript of the proceedings had before the justice in the replevin action, the court directed the jury to return a verdict for the plaintiff, upon which judgment was entered, and Schmoller & Mueller have appealed.

It is argued with great earnestness that the entry by the justice on the final trial amounts to nothing more

than a finding, upon which no judgment has ever been entered, and that no final judgment has yet been entered in the replevin action. Numerous cases are cited in support of this contention, and *Brounly v. Daniels*, 23 Neb. 162, which was also an action in replevin, is especially relied upon by the appellee. In that case the material part of the judgment entry objected to was as follows: "Whereupon, after having duly considered the evidence offered by plaintiff, the court finds that the right to the property and right to possession of said property, when this action was commenced, was in the plaintiff, and assess his damages in the premises in the sum of \$35; and also his costs herein expended, taxed at \$9.20." Relating to this entry this court, by chief justice REESE, said: "The questions presented by this record are: First, was there a judgment rendered in the county court? * * * As to the first question we think there can be no doubt. A judgment is defined to be 'a final determination of the rights of the parties in the action.' Civil code, sec. 428. In this case there is simply a finding of fact as to the ownership of the property and the assessment of damages. * * * In the proceedings now under consideration, we find that the county judge in effect rendered the finding and verdict upon the facts, similar to what is required of a jury in a similar case. Nothing more can be claimed for it. This being done, it then remained for the county court to render judgment against the defendant, which *was not* done. A finding in fact is not a judgment." If this case and several others cited by the appellee were the only authorities to guide us, we would be compelled to hold that the entry made by Justice Alstadt, and relied on by the appellants as constituting a judgment, was nothing more than a finding of facts corresponding to the verdict of a jury; but in *Fowler v. Thomsen*, 68 Neb. 578, nearly all the cases heretofore passed on by this court relating to the sufficiency of a judgment entry by a justice of the peace were reviewed, and the rule finally adopted that the judgment entry is sufficient if it shows the relief granted,

and that it was made by the court whose record it is, and that this rule is to be applied liberally to justice's proceedings. For this purpose it was held that resort may be had to the marginal notes, to the files in the case and to the entire record to ascertain what was done and who did it, and the judgment entry similar to the one in question, except that the action was on a money demand, was held to show a valid judgment, and not subject to collateral attack.

In the case at bar the marginal notes on the justice's docket refer, among other items, to the entry of a judgment and the taxation of the justice's fees therefor, and the whole record shows without doubt that it was the intention of the justice to enter final judgment in the case. This intention, it would seem, under our last holding, is sufficient. As said in *Fowler v. Thomsen*, *supra*: "The question is, does this transcript, taken as a whole, show that he reached that conclusion as a final determination of the action then pending before him? If it shows that he did, and that he entered it as such determination, until it is reversed, it will support an execution." Assuming, as we must, that the judgment of the justice is not void, what are the rights of the parties? That conversion cannot be maintained by Mrs. Nelson for the conversion of a piano taken from her on the writ of replevin by Schmoller & Mueller while the action is pending, unless before the trial Schmoller & Mueller had sold and disposed of the same, is a question not open to controversy. There was no evidence before the court to show a conversion by Schmoller & Mueller before the trial in justice court. That question is, therefore, not in the case. The trial in justice court having resulted in a judgment finding Schmoller & Mueller entitled to the possession of the property, their retention of possession, unless they have done some act inconsistent with the rights conferred upon them by the judgment, cannot amount to a conversion of the piano. Their affidavit in replevin alleged "that the plaintiffs have a special ownership in the above described

property by virtue of a lease executed by defendant and given plaintiffs, and there is due the sum of \$15.37." It appears, therefore, from their own affidavit that their interest in the piano was a special interest, amounting to \$15.37, and their right of possession would continue until this amount, with the costs of suit, was paid or tendered to them. The judgment of the justice must be construed in the light of the record made, and while it fails to describe the interest of Schmoller & Mueller in the piano, that interest is fully set forth in their own application for the writ. If since the entry of the judgment Mrs. Nelson had paid them this amount, with the costs of suit, or made a tender thereof, then their interest in the piano and their right of possession has ceased, and their further retention of the piano would amount to a conversion; but no such payment or tender is alleged in the plaintiff's petition, nor was any evidence of such payment or tender offered. Neither was it shown that Schmoller & Mueller had sold the piano and converted the proceeds. It may be that Schmoller & Mueller are still holding the piano as security for their claim. In this condition of the case the court erred in directing a verdict for the plaintiff below. It may be that Mrs. Nelson will be able to amend her petition, alleging facts showing a conversion by the appellants, but on the record made the judgment of the district court will have to be reversed and the cause remanded, and we so recommend.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

HENRY E. FREDRICKSON, APPELLANT, V. NICHOLAS
SCHMITTROTH ET AL., APPELLEES.*

FILED DECEMBER 7, 1906. No. 14,536.

New Trial: JOINT MOTION. Two defendants made separate answers, alleging separate and distinct defences to the plaintiff's petition. The court directed a verdict for one defendant and a finding of 6 cents damages in favor of the plaintiff against the other defendant. Plaintiff filed a joint motion for a new trial, which was overruled. The verdict being good as to one defendant, the motion was properly overruled, and the judgment as to both must stand. *Lydick v. Gill*, 68 Neb. 273.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JR., JUDGE. *Affirmed.*

Faucett & Abbott, for appellant.

*A. S. Ritchie, Charles L. Fritscher, B. F. Thomas and
Carl E. Herring, contra.*

DUFFIE, J.

October 31, 1902, Schmittroth purchased an automobile from Fredrickson for the sum of \$1,000, and executed a promissory note for that amount due April 30, 1903, upon which note the defendant Mengedoht became surety. The note by its terms provided that title to the automobile should remain in Fredrickson until the full amount of the purchase price was paid. Schmittroth claimed that the automobile was not giving satisfactory service, and it was placed in the possession of the Utah Automobile Company at Salt Lake City for the purpose of being overhauled and adjusted, Fredrickson doing this work through the above company as his agent. While the machine was in the possession of the Utah Automobile Company, the evidence tends to show that Mengedoht became alarmed lest he should have the note to pay, and made Fredrickson the

* Rehearing allowed. See opinion, p. 724, *post*.

following written proposition: "Mr. H. E. Fredrickson, Omaha, Neb. Dear Sir: In regard to the machine sold to Mr. Schmittroth on note which bears my signature, I ask you to have the machine shipped here and put in running order. If Mr. Schmittroth is unwilling to take the machine after it has been made to run and will not pay for it, I will take the machine and pay for it, and take up the note which was given for the machine, and also pay the freight from Salt Lake City to Omaha. It is understood that the note is not to draw any interest. Fred Mengedoht." Fredrickson instructed the company in Salt Lake City to ship the machine to Omaha, and then a short time after its arrival here he repaired the machine, and there is evidence tending to show that after testing it Mengedoht was satisfied with its operation, and agreed to accept and pay for it. This suit was originally commenced June 3, 1903, against Schmittroth and Mengedoht upon the note given for the machine. The case was passed from term to term until after the machine was shipped to Omaha and repaired, and until Mengedoht finally refused to take and pay for the machine, after which an amended petition was filed by the plaintiff, the amendment setting up a cause of action against Mengedoht upon his written proposition above set forth and the acceptance of the same by the plaintiff. At the conclusion of the evidence the court directed a verdict for the defendant Schmittroth, and it further directed a verdict in favor of the plaintiff and against Mengedoht for damages in the sum of 6 cents. Judgment was entered upon these verdicts, from which the plaintiff has appealed.

Both of the defendants filed answers in the case, the answers setting up different and separate defenses. The motion for a new trial was a joint motion, and the order overruling the same is alleged as error. It has long been the settled rule of this court that, where a motion for a new trial is insufficient as to one defendant, it should be overruled. *Long v. Clapp*, 15 Neb. 417; *Scott v. Chope*, 33 Neb. 41; *Dorsey v. McGee*, 30 Neb. 657; *McDonald v.*

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Bowman, 40 Neb. 269; *Lydick v. Gill*, 68 Neb. 273. The district court was of opinion that the contract of sale of the automobile was rescinded by Fredrickson when, on the request of Mengedoht, he ordered the same shipped from Salt Lake City to Omaha without the consent of Schmittroth. In this we think the court was correct. He certainly could not recover the consideration for the automobile after having taken possession and while retaining possession thereof. The motion was, therefore, properly overruled as to the defendant Schmittroth, and, this being so, under the authorities above cited, we cannot investigate any of the other questions raised by the appellant or reverse the judgment. If the court committed no error in refusing a new trial, as it is clear that the judgment must stand if there was no error in denying the motion for a new trial, we recommend an affirmance.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed June 7, 1907. *Former judgment of affirmance vacated and judgment of district court reversed:*

1. **Conditional Sale: WAIVER.** A vendor, by commencing an action on a note given for the purchase price of a machine, by the terms of which the title thereto is not to pass to the purchaser until full payment is made therefor, will ordinarily be held to have waived his title to the property and have vested the title thereto in the vendee.
2. ———: ———. Where, however, after commencement of such a suit, the vendor takes possession of the machine pending the action, with the consent of the vendee, for the purpose of repairing it and delivering it to a third person (the surety on the note) under a contract between himself and the surety only, and fails to redeliver it to the vendee, such conduct will relieve the vendee from his obligation to pay for the property.

3. **Directing Verdict.** Where the action proceeds against such surety on his agreement to take the property and pay the note given for its purchase price, and is defended on the ground of a breach of the agreement, if the evidence is conflicting the questions in issue should be submitted to the jury, and it is error for the court to direct a verdict for plaintiff for nominal damages only.

BARNES. J.

This case comes here on appeal from a judgment of the district court for Douglas county. By our former opinion, *ante*, p. 722, it was held that the motion for a new trial was a joint motion as to both of the defendants, and, as the ruling in favor of defendant Schmittroth was correct, the plaintiff was entitled to no relief. The case has been reargued, and we are now of opinion that our former decision was wrong. While but one motion for a new trial was filed in the court below, yet it appears to be not only joint but several in form, and asks for a new trial as to each of the defendants. Hence, the case of *Lydick v. Gill*, 68 Neb. 273, on which our former opinion was based, is not in point. Again, it appears that *Lydick v. Gill* was decided on its merits, and not upon the form of a motion for a new trial. It is true that matter was discussed in the opinion, but we have serious doubts as to the soundness of that discussion. We are therefore constrained to consider the several grounds presented by the appellant for a reversal of the judgment of the trial court.

It appears that on the 31st day of October, 1902, the defendant Schmittroth purchased an automobile from the plaintiff Fredrickson for the sum of \$1,000, which was later on delivered to him at Salt Lake City; that Schmittroth delivered to the plaintiff 4,000 shares of mining stock and his promissory note for \$1,000, signed by defendant Mengedoht, as surety, and it was agreed that plaintiff should have the option to keep the mining stock in full payment for the automobile and return the note, or return the mining stock to Schmittroth within 90 days and retain the note as payment for the machine. By the terms of the

note the title to the machine was not to pass to Schmittroth until the purchase price should be fully paid. Within the proper time plaintiff exercised his option, returned the mining stock and kept the note. Later on Schmittroth refused to pay for the automobile, and notified the plaintiff that he had left it with plaintiff's agent at Salt Lake City, subject to his order, because it could not be made to run and was wholly worthless. The plaintiff thereupon attempted, through his agents, to put the machine in running order, but failed to do so. He afterwards brought suit on the note in the district court for Douglas county against both of the defendants. Meanwhile the plaintiff continued his efforts to put the machine in running order, and negotiations were entered into between him and the defendant Mengedoht, which culminated in the following agreement: "Mr. H. E. Fredrickson, Omaha, Neb. Dear Sir: In regard to the machine sold to Mr. Schmittroth on note which bears my signature, I ask you to have the machine shipped here and put in running order. If Mr. Schmittroth is unwilling to take the machine after it has been made to run and will not pay for it, I will take the machine and pay for it, and take up the note which was given for the machine, and also pay the freight from Salt Lake City to Omaha. It is understood that the note is not to draw any interest. Fred Mengedoht." The plaintiff accepted the agreement according to its terms, brought the machine to Omaha, Mengedoht paying the freight, and claims to have adjusted it, repaired it and put it in perfect running order, and to have offered to send it to Schmittroth, and that Schmittroth refused to receive and pay for it. He thereupon amended his petition in the pending suit by setting up his new agreement with Mengedoht, and prayed for a judgment against both defendants for the purchase price of the machine. The defendants answered the amended petition separately, each admitting the execution of the written instruments sued on, and each pleaded fraud, misrepresentation and a failure of consideration, in that the automobile could not

be made to run and was wholly worthless for the purpose for which it was sold. A trial was had on these issues, and at the close of the plaintiff's evidence the court directed the jury to return a verdict for the defendant Schmittroth, and this order is assigned as error.

The plaintiff's brief contains a lengthy and learned discussion of the rights and obligations of the parties under the several contracts, and especially as to the effect of the commencement of the action. It is contended that by bringing suit on the note in question the plaintiff elected to waive the ownership or title retained by him by the terms of that instrument, and the title to the machine thereupon vested fully and completely in the defendant Schmittroth. There is no doubt but this statement would be correct if the plaintiff had not taken the machine away from Schmittroth, and assumed the possession and ownership thereof for the express purpose of carrying out his agreement with the defendant Mengedoht. His action in that behalf was inconsistent with such waiver, and, when he failed to put the machine in running order and redeliver it to Schmittroth, he relieved him from his obligation to pay for it, and the court properly directed the jury to return a verdict in his favor.

It is insisted, however, that the verdict should be set aside because it did not dispose of Schmittroth's counterclaim for \$156. By asking for the instruction complained of, and accepting the verdict, it seems clear that Schmittroth has waived his right to any relief on his counterclaim, and the plaintiff should not be heard to complain because no judgment was rendered against him thereon.

It further appears that after the introduction of all of the evidence the defendant Mengedoht waived his right to recover on his counterclaim, requested the court to direct a verdict against him, and in favor of the plaintiff, for the sum of 6 cents: His request was granted, and the jury returned a verdict accordingly. This direction is complained of, and is also assigned as error. Much discussion is indulged in by the plaintiff as to the nature and

effect of his contract with the defendant Mengedoht. It is insisted that his agreement did not amount to a novation; that it was not a new contract, and did not affect the rights of the parties as they stood under the original agreements. We think all of this discussion is beside the mark; for it clearly appears that the case, as to the defendant Mengedoht, was tried on the theory that the plaintiff had complied with the new agreement, had put the automobile in good running order, had tendered it to Mengedoht, and was therefore entitled to a judgment against him for the face of the note, the payment of which he had assumed by his new agreement. On this theory much evidence was introduced by both parties. One attempting to prove that the automobile was put in good running order and was a practical machine—and that it was tendered to the defendant; while the defendant attempted to show that the automobile would not run, was of no value whatsoever, and therefore he was justified in refusing to accept it, and carry out his contract to pay for it and take up the note in suit.

It appears that Mengedoht defended the action upon the ground of a breach of warranty; and, while this action was pending on the note, he made the contract which is set out in the opinion, by which he agreed, upon certain things being done by Mr. Fredrickson, he would take the automobile and would pay the note upon which he was sued. This agreement was set up in the supplemental petition, and the failure of the automobile as warranted being still insisted upon, the issue presented by the petition and supplemental petition of the plaintiff and the answer of defendants tried, and the judgment upon this trial is the one here complained of. There seems to be no question in regard to the delivery of the automobile upon its sale to Schmittroth. It was never returned generally to Fredrickson, but he was allowed to take possession of it for a special purpose to enable him to comply with the contract that was made with a view to a settlement of the litigation. The question tried was whether Fredrickson

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had complied with the terms of the supplemental agreement of settlement with Mengedoht, the surety. This question should have been submitted to the jury, and the court erred in instructing the jury to find a verdict for the plaintiff for nominal damages only.

For the foregoing reason, our former judgment is vacated, and the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

JOHN WEIS, JR., APPELLANT, v. JOHN W. FARLEY ET AL.,
APPELLEES.

FILED DECEMBER 7, 1906. No. 14,559.

Evidence examined, and *held* to justify the decree.

APPEAL from the district court for Boone county:
JAMES N. PAUL, JUDGE. *Affirmed.*

J. S. Armstrong, A. E. Garten and J. M. Armstrong,
for appellant.

H. O. Vail and W. W. Thompson, contra.

DUFFIE, C.

John Weis, a judgment creditor of John W. Farley, brought this action to subject certain property claimed by Mary J. Farley, Frank M. Ryner and Osborn Patterson to the payment of his judgment. His bill was dismissed by the district court, and he has appealed. He makes no complaint of the decree so far as it dismisses his bill against Ryner and Patterson, his whole complaint being that the evidence demands a decree subjecting the property claimed by Mrs. Farley to the payment of his judgment. Some time after her marriage in Michigan,

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Mrs. Farley received \$700 from her father's estate. This money she loaned to her husband, or at least it was used in moving from Michigan, and in securing and improving a homestead in Boone county, Nebraska. The testimony is undisputed that, in consideration of this loan, the husband was to deed her 80 acres of the homestead. This was not done, but a timber claim adjoining the homestead was later purchased, the title taken in the name of Mr. Farley, who held it about two years and then conveyed to his wife through a third party. This conveyance, it is claimed, was made in consideration of the money loaned by Mrs. Farley to her husband, but, even if that were not the case, it appears quite clearly from the evidence that Farley, at that time, was not so badly indebted as to render the conveyance invalid, even if we regard it as a gift. This timber claim was later traded for a stock of boots and shoes, the ownership of which was vested in the husband, he giving to his wife a note for a little more than \$1,700 on account of her ownership of the land traded for this stock. Later the stock of boots and shoes was traded for a stock of hardware, and about the time that Weis obtained his judgment against John W. Farley he conveyed the hardware stock to his wife by bill of sale in payment of the \$1,700 note. It is this stock of hardware which is sought to be subjected to the payment of the plaintiff's judgment. A careful reading of the evidence convinces us that Farley was indebted to his wife in the amount claimed, that the timber claim was conveyed to her on account of such indebtedness, that she assented to the sale of her timber claim for the stock of boots and shoes, taking her husband's note for \$1,700 for her interest in the land, and that the note has not been paid, except by transfer to her of the stock of hardware in controversy in this suit. Being a creditor of her husband, she had the same right as any other creditor to secure payment of the indebtedness, and fraud cannot be predicated upon such a transaction.

Letherman v. Hauser.

The decree of the district court is well supported by the evidence, and we recommend its affirmance.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

GEORGE C. LETHERMAN ET AL., APPELLANTS, V. ADAM
HAUSER ET AL., APPELLEES.

FILED DECEMBER 7, 1906. No. 14,329.

1. **Highways: VACATION.** The statutory provision that a petition for the establishment or vacation of a public road shall be signed by at least ten electors residing within five miles of the road is jurisdictional.
2. ———: **JURISDICTION.** The facts essential to the jurisdiction of a county board to establish or vacate a road must affirmatively appear on the record of the proceedings.
3. **Nuisance: INJUNCTION.** A party complaining of a public nuisance is not entitled to relief by injunction, unless he shows some special injury to himself different from the common injury to the public.
4. **Highways: VACATION.** An elector residing within five miles of a public road has such special interest therein, independent of that which he has in common with the public, as will enable him to maintain a suit to restrain the unlawful closing of such road to public travel.
5. **Injunction: REMEDY AT LAW.** On the facts stated, *held* that the plaintiff had no adequate remedy at law.

APPEAL from the district court for Sherman county:
BRUNO O. HOSTETLER, JUDGE. *Reversed with directions.*

Aaron Wall, H. M. Mathew and R. J. Nightingale, for appellants.

T. S. Nightingale, R. P. Starr and J. S. Pedler, *contra.*

ALBERT, C.

This suit was brought to restrain the defendants from obstructing and closing an alleged public road. The petition describes the road, shows that at least one of the plaintiffs resides within five miles of it, and charges that the defendants are obstructing and closing it to public travel. The defense is based on three grounds: (1) That previous to the obstruction and closing of the road by the defendants it had been duly vacated by the county board; (2) that the plaintiffs sustain no other or different injury from the obstruction of the road than that sustained by the public generally; (3) that plaintiffs have one or more adequate remedies at law. As to the first defense the court made no finding, but as to the others found for the defendants, and dismissed the suit. The plaintiffs appeal.

The record shows that proceedings were had before the county board looking to the vacation of this road. But there are several reasons why such proceedings are not available as a defense to this suit, one of which is that they were not carried forward to a final order or judgment vacating the road. Another reason is that the record of the proceedings before the county board fails to show that any of the parties who petitioned for the vacation of the road reside within five miles of it. Section 4, ch. 78, Comp. St. 1903, provides, in substance, that the petition for the establishment or vacation of a public road shall be signed by at least ten electors residing within five miles of the road to be established or vacated. That at least ten of the petitioners reside within five miles of the road is a jurisdictional fact which must affirmatively appear on the record of the proceedings. *Doody v. Vaughn*, 7 Neb. 28; *Lesieur v. Custer County*, 61 Neb. 612, and cases cited. As it does not thus appear in this case, the record is fatally defective.

But it is insisted that the plaintiffs must fail because they have failed to show any special injury to themselves different from the common injury to the public. The acts

charged against the defendants constitute a public nuisance, and it is well settled that a party complaining of a public nuisance is not entitled to relief by injunction unless he shows some special injury to himself, different from the common injury to the public. 1 High, Injunctions (4th ed.), sec. 762; 4 Pomeroy, Equity Jurisprudence (3d ed.), sec 1349; *Taylor v. Portsmouth, K. & Y. Street R. Co.*, 91 Me. 193, 64 Am. St. Rep. 216; *Zettel v. City of West Bend*, 79 Wis. 316, 24 Am. St. Rep. 715; *Clark v. Chicago & N. W. R. Co.*, 70 Wis. 597, 5 Am. St. Rep. 187. But in this case at least one of the plaintiffs (Letherman) is an elector, and resides within five miles of the road in question. In the proceedings instituted before the county board for the vacation of the road he and the other plaintiffs appeared and remonstrated against such action. In *Throckmorton v. State*, 20 Neb. 647, the relator asked a writ of mandamus to compel the county board to open a certain section line road. His right to maintain the suit was assailed on the same ground upon which plaintiffs' right to maintain this suit is now assailed. But the court there held that the fact that the relator was an elector residing within five miles of the road gave him such a special interest therein, independent of that which he had in common with the public, as would enable him to maintain the suit. The reasoning in that case applies with equal force to this, and justifies the conclusion that the plaintiff Letherman at least has a sufficient special interest in the road, independent of such as he shares in common with the public, to enable him to maintain this suit.

As to the third defense, so far as the plaintiff Letherman is concerned, he has, as we have seen, a special interest in the road. It is his best and most available route to his market town and county seat. He has a present right to its use. The damages resulting to him by its obstruction, while real and substantial, could hardly be ascertained by reference to any pecuniary standard. Proceedings at law, whether civil or criminal, would not be sufficiently prompt to be effective. In such circumstances

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injunction is the proper remedy. Elliott, Roads and Streets, ch. 33, p. 665; 1 High, Injunctions, secs. 594-596. See, also, *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238.

We discover no defense to this case as made by the plaintiff Letherman, and we recommend that the decree of the district court be reversed and the cause remanded, with directions to enter a decree in favor of the plaintiff Letherman, enjoining and restraining the defendants and their successors, agents and employees from obstructing or closing the road in question.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded, with directions to enter a decree in favor of the plaintiff Letherman, enjoining and restraining the defendants and their successors, agents and employees from obstructing or closing the road in question.

JUDGMENT ACCORDINGLY.

R. A. McMASTER, APPELLEE, v. C. E. DOUTHIT ET AL,
APPELLANTS.

FILED DECEMBER 7, 1906. No. 14,461.

Evidence examined, and held to sustain the findings and decree of the trial court.

APPEAL from the district court for Dixon county:
GUY T. GRAVES, JUDGE. *Affirmed.*

C. A. Kingsbury and F. S. Berry, for appellants.

John V. Pearson and F. A. McMaster, contra.

ALBERT, C.

The appellant Douthit built a house for the appellee. The other appellant furnished a large portion of the ma-

terial. After the house was built, and within the time required by law, the appellants each filed a lien against the premises on which the house was built, Douthit claiming \$1,329.86 for labor and material furnished by him, the lumber company claiming \$1,169.86 for material furnished by it. Afterwards the appellee brought this suit against the appellants, alleging in effect, among other things, that the house had been erected under a contract between herself and Douthit, whereby it was agreed that he should furnish the labor and material necessary to build the house for \$1,965, and that afterwards certain minor changes were agreed on, and the price thereof fixed, whereby the contract price was raised to \$2,045, which amount had been fully paid to Douthit before his lien was filed; that she never had any contract with the appellant lumber company to furnish the material for the erection of the house, and that its contract therefor was with the appellant Douthit. She further alleges these liens stand of record and constitute a cloud on her title, and asks to have them canceled and the cloud removed. The appellants, in addition to certain defenses, each filed a cross-petition, asking a foreclosure of his lien. The court granted the appellee the relief prayed, and the appellants prosecute separate appeals.

The case between the appellee and Douthit involves only a question of fact, the former claiming in effect that the latter agreed to build the house and furnish all the labor and material necessary therefor for \$2,045, the latter claiming, in effect, that he agreed to build the house and to furnish the labor and material necessary therefor, but that no price was fixed. It is conceded that before the building was commenced the plaintiff submitted a rough plan thereof to Douthit, and that he offered to build the house for \$1,850. The parties then took the rough plan to an architect, who prepared plans and specifications in detail.

According to the testimony of the plaintiff's husband, who acted for her throughout the entire transaction, there

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was a little delay in getting the plans, and when the ground plan was brought to the attention of Douthit he insisted that it called for a house somewhat larger than the one he had agreed to build for \$1,850; that after some discussion it was agreed that Douthit should proceed with the building, and should be allowed \$1,965, instead of \$1,850; that some minor changes were afterwards made, the price of which was fixed by agreement in advance, raising the entire price at which Douthit was to build the house to \$2,045. In short, the testimony of this witness is to the effect that there was a definite and fixed price to be paid for the erection of the building. This testimony is corroborated by that of numerous other witnesses, who testified, in effect, that at various times while the building was in progress Douthit complained of his contract, stated that he was losing money by it, expressing the wish that he was out of it, all tending to show that he fully understood while the work was in progress that he was bound to finish the building at a fixed price.

According to Douthit's testimony, when the plans of the architect were first submitted to him, or a portion of them, he called the attention of appellee's husband to the fact that such plans called for an entirely different house than the one he had agreed to build for \$1,850, and that the appellee told him to proceed with the erection of the house according to the plans and specifications, and she would pay him the difference, or what the work and material was reasonably worth. This testimony is corroborated by that of another witness, who testified to a conversation he overheard between Douthit and appellee's husband tending to show the same state of facts. But the force of this corroborating testimony is much impaired by the subsequent testimony of the witness showing that he dealt with the parties on the theory that the consideration to be paid Douthit for building the house was fixed by contract. Aside from the testimony of this witness, the only evidence relied on as corroborating Douthit is such as tends to show that the amount for which

the appellee claims he agreed to build the house was far below what it was reasonably worth. To our minds, such evidence is entitled to little, if any, weight. If evidence that the obligations which a party has assumed by his contract are onerous and burdensome is to be received as evidence that he never made the contract, it would be an easy matter to avoid a bad bargain. Besides, it sometimes happens that a contractor purposely undertakes to erect a building for less than the work can be done, expecting to recoup on extras, or by a showing of such departures from the original contract as would enable him to recover on a *quantum meruit*. The record would indicate that something of that kind has been attempted in this case. We are satisfied that the appellee established her theory of the transaction by a clear preponderance of the evidence.

We come now to the appeal of the lumber company. Its original cross-petition was framed on the theory that it had filed a subcontractor's lien for material furnished to Douthit, as contractor, for the construction of the building. It afterwards filed an amended cross-petition, framed on the theory that the material was furnished under a direct contract with the appellee. The evidence is clear and conclusive that the material was furnished to Douthit. It was charged to him on the books of the lumber company. There is no evidence that we have been able to discover in the record tending to show a direct contract between the appellee and the lumber company for this material. On the contrary, the evidence adduced on behalf of this company itself shows that they knew that Douthit was under a contract to build the house for a stated consideration. Their agent who transacted the business for them testified on their behalf as a witness. Running through his testimony are to be found statements which show that at the time the material was furnished he had in mind the possibility that Douthit might lose money on the contract and not be able to pay the bills for material furnished. Taking this evidence in connection with the testimony hereinbefore referred to showing

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a contract for the erection or construction of the building for a specified sum, it precludes the idea that Douthit was the agent of the appellee, or could bind her for this material, or that the lumber company had any reason to believe he had. The lumber company's rights, if it has any, are those of a subcontractor, but, as it made its election in the district court to proceed on the theory that it had a direct contract with the appellee to furnish this material, it is bound by that theory now. It might be said, in passing, that its election to proceed on that theory was not ill advised, because, under the evidence, its lien would be defeated on either theory.

The decree of the district court is clearly right, and we recommend that it be affirmed.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

**ANNA D. SCHALLENBERG, APPELLEE, V. CARL KROEGER
ET AL., APPELLANTS.**

FILED DECEMBER 7, 1906. No. 14,541.

1. **Suits: CONSOLIDATION.** Where the defendant in a suit to quiet title files a separate suit against the plaintiffs asking the same relief against them with respect to the same property, and the two suits are consolidated, the parties are in no different position than if, instead of a separate suit, the plaintiff in such separate suit had filed a cross-petition in the original suit asking for a decree quieting her title.
2. **Decrees: VACATION.** Although separate decrees are entered after such consolidation, they are, in effect, one decree, and an order vacating the one vacates both.
3. **Record, Correction of: REVIEW.** Error cannot be predicated on an order correcting a record, making it show expressly what it already shows by necessary implication.

APPEAL from the district court for Dodge county:
JAMES A. GRIMISON, JUDGE. *Affirmed.*

Courtright & Sidner, for appellants.

Loomis & Maynard, contra.

ALBERT, C.

On the 12th day of July, 1899, two suits were pending in the district court for Dodge county between the same parties, which we shall hereafter refer to as case No. 1, and case No. 2, respectively. In case No. 1 Carl and Theodore Kroeger were plaintiffs, and Mrs. Anna D. Schallenberg was defendant. In case No. 2 the parties were in reverse order. The pleadings in case No. 1 are not before us, but from the proceedings had, and the answer filed in the other case, it appears that the plaintiffs sought to quiet their title to certain real estate as against the defendant. In case No. 2 the plaintiff sought to quiet her title to the same real estate as against the defendants. On the date mentioned, the parties agreed in open court that the two cases "be tried as one case." The cases came on for trial on the 19th day of June, 1903. At that time Mrs. Schallenberg was mentally incompetent, and her attorney, for some reason, had withdrawn from the cases. A trial was had in her absence, and without anyone appearing for her. The two cases were tried at the same time, and submitted on the same evidence, but separate decrees were entered, one in case No. 1 quieting and confirming the title of the plaintiffs therein to the land in controversy, and one in case No. 2 dismissing the bill. Afterwards a guardian was appointed for Mrs. Schallenberg, who, during the term at which the decrees were entered, filed a motion purporting to be filed in case No. 1, and containing no reference to case No. 2, asking for a vacation of the decree, and for opportunity to make a defense for his ward. A hearing was had on this motion,

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at which the Kroegers were represented by counsel, and the motion was allowed, and an order vacating the findings and decree was entered on the 7th day of November, 1903. This order on its face refers only to the findings and decree in case No. 1. At a subsequent term the guardian filed a motion, entitled in case No. 2, for the entry of an order *nunc pro tunc* vacating the decree in that case. This motion was made on the theory that, while the motion for the vacation of the decree was entitled in case No. 1, it was, in effect, a motion for a vacation of both decrees, and was so considered by the court, and that the order of the court thereon was in fact that both decrees be vacated. The motion for the order *nunc pro tunc* was allowed, and an order entered as of November 7, 1903, vacating the decree in case No. 2. From the order allowing this motion the Kroegers appeal to this court.

It may well be doubted whether the entry of the order *nunc pro tunc* was necessary to protect the rights of the party on whose behalf the motion therefor was made. The two suits involved precisely the same issues. In case No. 1 the Kroegers prayed for a decree quieting their title as against Mrs. Schallenberg; in case No. 2 she prayed for a like decree against them. When the cases were consolidated for trial they became one case. Thereafter the parties were in no different position than they would have been in had Mrs. Schallenberg filed a cross-petition in case No. 1, asking a decree quieting her title, instead of commencing a separate suit asking such relief. That two decrees were entered instead of one is a mere matter of form. They constitute, in fact, a single decree disposing of the issues in a single controversy. An order vacating such decree, under whichever title entered upon the record, is an order vacating the entire decree, that is, the decree disposing of the entire controversy. As such was the legal effect of the order actually made vacating the decree, there could be no error in permitting the record to show expressly what would necessarily be implied therefrom.

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We recommend that the order for the entry of the order of vacation *nunc pro tunc* be affirmed.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the order for the entry of the order of vacation *nunc pro tunc* is

AFFIRMED.

OMER C. FLORA, APPELLANT, v. BRAZILLA F. CHAPMAN,
APPELLEE.

FILED DECEMBER 7, 1906. No. 14,542.

Evidence examined, and held sufficient to sustain the verdict of the jury.

APPEAL from the district court for Dawson county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

George C. Gillan, for appellant.

E. A. Cook, contra.

ALBERT, C.

Omer C. Flora brought an action against Brazilla F. Chapman to recover the reasonable value of certain work and labor performed by him at the instance and request of the defendant. The defendant entered a plea of accord and satisfaction, and issue was joined thereon. The evidence shows that there was a dispute between the parties as to the amount due. It also shows that the defendant paid an attorney, who claimed to represent the plaintiff and to have authority to compromise and collect the claim, a certain amount in full satisfaction of the debt. The only question in the case is whether such attorney had authority to bind the plaintiff by the compromise and the acceptance of the amount agreed upon in satisfaction of

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the debt. The evidence adduced by the plaintiff negatives such authority. But the evidence of the attorney himself was introduced, and is to the effect that the plaintiff left the claim with him for collection; that afterwards, according to his recollection of the matter, the defendant offered a certain amount in satisfaction of the claim, which offer was submitted to the plaintiff, who instructed the attorney to accept it, and that the defendant then paid him the amount agreed upon and he accepted the same for the plaintiff in full payment of the claim. At this late day it is unnecessary to cite authorities to support the proposition that, where a question is submitted to a jury on conflicting evidence from which reasonable minds might reach different conclusions, the finding thereon will not be disturbed by this court. Such is the state of the record in this case. The jury found for the defendant on conflicting evidence, and there is no good reason shown for disturbing their verdict.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

**R. M. WOLCOTT, APPELLEE, V. STATE FARMERS MUTUAL
INSURANCE COMPANY, APPELLANT.***

FILED DECEMBER 7, 1906. No. 14,466.

1. **Mutual Insurance Companies: ASSESSMENTS.** Mutual fire insurance companies cannot make assessments upon their members, as provided in section 12, ch. 33, laws 1891, until loss has first occurred, unless such assessments are authorized by a two-thirds vote of their directors.

* Rehearing denied. See opinion, p. 746, post.

2. ———: ———. When it is sought to avoid a policy of insurance for the nonpayment of an assessment, not made for the payment of a loss, the records of the company are insufficient to establish the validity of such assessment, unless it affirmatively appears therefrom that the statute has been complied with.

APPEAL from the district court for Merrick county:
JAMES G. REEDER, JUDGE. *Affirmed.*

E. R. Leigh and J. E. Dorsheimer, for appellant.

Martin & Ayres, contra.

JACKSON, C.

The defendant is a mutual insurance company organized under the law of Nebraska. On February 21, 1902, the plaintiff made written application to the defendant for a fire insurance policy covering a hay barn and its contents. The application contained this printed memorandum: "I hereby agree to be governed by the articles of incorporation, by-laws, and rules now in force or that shall hereafter be adopted by said company." On March 4 following defendant issued its policy, one of the conditions of which is: "It is agreed and understood that this policy or certificate of membership is issued and remains in force on the condition that said applicant complies with the by-laws, rules and regulations that are now in force or that may hereafter be adopted, and are made a part of this certificate." On the back of the policy is printed what purported to be a copy of the by-laws of the company. The only provision for assessments in the by-laws as they appear on the policy is: "In case of an assessment each member assessed shall be notified by letter post paid, by the secretary, to the address named in his application, and if the insured shall refuse or neglect to pay such assessment within thirty days after mailing the notice as above specified, then this company shall not be liable in case of loss under his certificate until such payment is made; if the loss is approved by the board and

such loss exceeds in amount the cash fund on hand of the company, the secretary shall assess all who are members at the date of said loss, and prorate according to the amount of insurance." On August 28, 1904, plaintiff sustained a loss of the barn covered by the policy and its contents, due notice of which was given to the defendant, resulting in a refusal to pay the loss. Suit was instituted in the district court, where the judgment was favorable to the plaintiff, and the defendant appeals.

The defense was grounded on the claim of a suspension of the policy by reason of the nonpayment of an assessment. At the trial the defendant offered to prove that its by-laws had been amended on April 3, 1901, to provide that assessments should be made by order of the board of directors and prorated according to the time the insurance had been in force, and at the same meeting a resolution was adopted requiring members to pay an assessment of 10 cents a month on each \$1,000 for combined insurance, and 5 cents a month on single, on memberships that had been in force over two years. About June 20, 1904, the plaintiff received from the defendant the following notice: "State Farmers Mutual Insurance Company, South Omaha, Nebraska, June 17, 1904. R. M. Wolcott, Archer. Dear Sir: You are hereby notified that the assessment against your policy No. 7207, in force 24 months, is \$3.75, on combined. Total \$3.75. Which amount please remit by money order or draft payable to the State Farmers Mutual Ins. Co., South Omaha, Neb. If by personal check, add 10 cents for exchange. Return this notice with remittance. Your policy will lapse in 60 days from the date of this notice unless assessment is paid. March assessment. B. R. Stauffer, Secretary." It is admitted that this assessment was not paid at the time of the loss, more than 60 days after the receipt of the notice.

By section 12, ch. 33, laws 1891, it is provided with reference to mutual insurance companies: "Whenever the amount of any loss shall have been ascertained, which exceeds in amount the cash funds of the company, the sec-

retary shall make an assessment upon all of the property insured by the company; Provided, that any company may provide in its by-laws for making assessments at stated intervals only, and may also provide that assessments shall be made by the board of directors." Section 13 is: "It shall be the duty of the secretary, whenever such assessment shall have been made, to immediately notify every person composing such company, personally, or by a letter sent to his usual post office address, of the amount of such loss, and the sum due from him as his share thereof, and of the time and to whom such payment is to be made; but such time shall not be less than twenty (20) nor more than forty (40) days from the date of such notice." By section 19 it is provided: "Such mutual insurance companies shall never make assessments upon their members, as provided in section twelve (12) of this act, until loss has first occurred, unless the directors by a two-thirds (2-3) vote order an assessment. They shall never make any dividends."

It will thus be seen that there are two methods allowed by statute for making assessments in mutual insurance companies: First, where a loss has actually occurred and the cash on hand is insufficient to make payment thereof; and, second, by a two-thirds vote of the board of directors after being duly authorized by the by-laws. The record contains no proof, or offer of proof, to show that an assessment was necessary to pay the losses of the company, so that the assessment and failure to pay the same constitute no defense to the plaintiff's action, unless it can be sustained under that provision of the statute authorizing assessments by a two-thirds vote of the directors. It is evident that the minutes of the meeting of the board of directors, by which the defendant offered to prove the assessment, were insufficient for that purpose. An assessment, in the absence of loss could only be made by a two-thirds vote of the board of directors. It does not appear in the record, or in any proof tendered, how many members constituted the board

of directors, nor does it appear how many voted for the assessment and how many against it. There is a memorandum in the minutes that the motion to adopt the plan of assessment was carried, but it is not disclosed in the record that the minutes were approved by the board of directors. While, ordinarily, in an action between a corporation and one of its members the records kept by a proper officer are admissible in evidence, yet, where, as in this case, it is sought by the record alone to avoid a contract, we think the record should show affirmatively that the statute has been complied with.

The errors, if any, in excluding the evidence offered were without prejudice, and we recommend that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on motion for rehearing was filed May 10, 1907. *Rehearing denied:*

1. **Mutual Insurance Companies: Assessments.** A by-law which provides "that assessments shall be made by order of the directors, and shall be prorated according to the time the insurance has been in force," is not authority for making assessments at stated intervals.
2. ———: ———. An assessment levied by such company must be against the entire membership, and if levied against a part only is invalid.
3. **By-Law: Validity.** The authority of the board of directors to adopt a by-law authorizing themselves to levy assessments, questioned.

ALBERT, C.

The facts in this case are set forth at some length in our former opinion, *ante*, p. 742. From an examination of that opinion it will be seen that the vital question

between the parties is whether the assessment there referred to was authorized and valid. If it was, the plaintiff was in default when the loss occurred, and the defendant is not liable on the policy. The reargument leaves some doubt in our minds whether the fact that the minutes of the defendant company failed to show affirmatively that the assessment in question was authorized by a two-thirds vote of the directors would justify their exclusion, when offered in evidence for the purpose of showing that the assessment had been made. For that reason, and since their exclusion may be justified on other grounds, it is thought best to leave that question open.

As shown in the former opinion, the defendant company exists under and by virtue of chapter 33, laws 1891. The authority to levy assessments is restricted, and the manner of its exercise prescribed by section 12 of that act, which is as follows: "Whenever the amount of any loss shall have been ascertained, which exceeds in amount the cash funds of the company, the secretary shall make an assessment upon all the property insured by the company. Provided, that any company may provide in its by-laws for making assessments at stated intervals only, and may also provide that assessments shall be made by the board of directors." An analysis of this section shows that there are two agencies of the company by which assessments may be made: (1) The secretary, under the general authority conferred upon him by the statute; (2) the board of directors, when authorized by by-law. It also shows that, as a prerequisite to a valid assessment, there must be either an actual loss, for the payment of which the assessment is required, or a by-law authorizing assessments at stated intervals. The assessment in question was not made by the secretary, nor was it made for the payment of a loss which had actually occurred. Consequently it was incumbent upon the defendant to show: (1) A by-law authorizing the board of directors to make assessments; and (2) a by-law authorizing assessments to be made at stated intervals. In order to do this the defendant

offered in evidence the minutes of a meeting of the board of directors held on the 8th day of January, 1901, showing that the following amendment to the by-laws had been proposed: "That assessments shall be made by order of the directors and shall be prorated according to the time the insurance has been in force." It also offered in evidence the minutes of a meeting of the board of directors held the following April, showing the adoption of the proposed amendment to the by-laws. The minutes in each instance were excluded, and, we think, properly. The most that can be claimed for the amendment is that it authorizes assessments to be made by the board of directors instead of the secretary. It contains no hint that assessments shall be made at stated intervals, or at any time other than when required to meet a loss which has actually occurred. Besides, the assessment in question, which it is claimed was levied under this amendment, was levied only against those who had been members of the association more than two years. The entire act contemplates that assessments shall be levied upon the entire membership, and even if it were possible to change this feature of the act by a by-law of the company, the one offered in evidence contains nothing to indicate that any such change was intended. Besides, the power of the board of directors to adopt a by-law conferring authority upon themselves to make assessments may well be doubted. There is certainly some ground for the belief that the legislature intended to confer no such power on the directors, but to leave it in the hands of the membership at large. But upon that point we express no opinion. The evidence was properly excluded, and, as this left the defendant without any proof that the assessment in question was authorized or legal, the court properly directed a verdict in favor of the plaintiff.

It is recommended that the motion for rehearing be overruled.

DUFFIE and JACKSON, CC., concur.

By the Court: Motion for rehearing

OVERRULED.

GREELY BAKER, APPELLANT, V. SWIFT & COMPANY,
APPELLEE.

FILED DECEMBER 7, 1906. No. 14,544.

Directing Verdict. Where from the undisputed evidence it appears as a matter of law that the plaintiff should not recover, the action of the trial court in directing a verdict for the defendant *held* to be the only proper course to pursue.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

John O. Yeiser, for appellant.

Greene, Breckenridge & Kinsler, contra.

JACKSON, C.

The action is one to recover damages for a personal injury which the plaintiff claims to have sustained on account of the negligence of the defendant. At the close of the plaintiff's evidence the jury were instructed to return a verdict for the defendant. The plaintiff appeals.

The only testimony in the record is that of the plaintiff himself, and it tends to prove that the plaintiff was employed in the hog-killing department of the defendant, who is engaged in operating a packing house in South Omaha. He was employed in the same room with some 40 or 50 other workmen, all engaged in the same character of employment. On the 8th day of April, 1902, their duties for the day were terminated at about 3 o'clock in the afternoon. The plaintiff went immediately to one of the benches used by the employees in the course of their labor, where he was engaged in washing himself and clean-

ing his tools preparatory to leaving the building, when another workman, who was at that time using a hose through which hot water was being forced under pressure of steam for the purpose of cleaning up the room, as it was a daily custom to do after the killing operations for the day had ceased, either carelessly or purposely turned the hose in the direction of the plaintiff so that the water was forced onto his person, resulting in his being severely scalded. The employee who was using the hose was a negro boy about 14 years of age, and had previously been performing the same character of service as that required of the plaintiff. Whether he was so employed on the day of the injury does not appear. The plaintiff and other employees in his department were all under the direction of the same foreman. It appears also from the testimony of the plaintiff that the day before the injury he had engaged in an altercation with the negro.

It is contended by the appellant that at the instant the last animal passed through their hands for the day the relation of master and servant ceased, and that the application of the fellow servant rule no longer applied, and that he was entitled to the same protection a stranger would be entitled to who came upon the premises of the defendant by invitation; that no rule of the establishment required him to wash himself or clean his tools on the premises, but that the fact that conveniences were at hand for that purpose was a mere invitation to do so. It is worthy of notice in that connection that a time keeper was employed by the defendant, who gave each laborer a time-check when he entered the establishment in the morning, and that each, as he completed his day's labor deposited his check when he passed out. This the plaintiff had not done at the time of the injury.

We do not regard the fact that the appellant had actually ceased from labor for the day as being at all important in a determination of the questions involved. He was still on the appellee's premises, and it does not follow that, because the injury resulting from the negligence of

his fellow servant was not concurrent in point of time with his actual employment, the master would be thereby liable. *Butler v. Townsend*, 126 N. Y. 105. We entertain no doubt that the appellant and the negro boy were fellow servants under the rule of *Kitchen Bros. Hotel Co. v. Dixon*, 71 Neb. 293. The case in some respects is similar to that of *O'Neil v. Pittsburg, C. C. & St. L. R. Co.*, 130 Fed. 204. The same principle, at least, was there involved as in the present case. It is urged, however, that the employment of a negro boy of the age of 14 years for the performance of the service required was of itself negligence. From the testimony of the appellant it is evident that the negro was well developed for a boy of his age, as much so as the appellant himself, who was some years older, and we do not concur in the views expressed by appellant that the race to which he belonged is a proper element to be considered in determining whether or not he was capable of performing the service required of him.

Several assignments of error relate to objections to questions propounded by counsel for appellant, which were sustained by the trial court. They are all disposed of in the brief by the statement: "The other assignments only affect the record in showing the court prevented plaintiff from clearly rebutting the attempt to show consociation. Had the court not sustained objections to questions asked to show two distinct gangs and two separate foremen and different times of work for each gang as shown in remaining assignments of error, we would have affirmatively shown no possibility even for the existence of any such possible matter to have been interposed as a defense."

There are two answers to the suggestion: First, that the appellant was finally permitted to testify that he did not know whether there was any other boss or foreman after the last hog went over the line, or whether the foreman of the hog-killing gang stayed and continued to be boss over any other gang that might follow; and, second,

no offer to prove any special fact was made after the objections to the interrogatories were sustained.

The judgment of the district court was right, and we recommend that it be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA V. STATE JOURNAL COMPANY.*

FILED DECEMBER 21, 1906. No. 13,833.

1. **Principal and Agent.** An agent cannot avail himself of any advantage his agency may give him to profit out of the subject of the agency beyond the agreed compensation for his services.
2. **Contract: SUPREME COURT REPORTS, PUBLICATION OF.** The contract of the state with the defendant to print and manufacture for the state certain volumes of the supreme court reports, and that the "plates" upon which such printing was done should be delivered to, and become the property of, the state, did not constitute the defendant the agent of the state in the "publishing business."
3. ———: ———. Under such contract the law will imply an agreement on the part of the defendant not to use the property of the state, intrusted to its care to enable it to perform its contract with the state, for any other purpose than that contemplated in the contract. By a violation of such implied agreement it would become liable to the state for the value of such unauthorized use, and also for any injury done to the property thereby.
4. **Copyright.** The word copyright is generally used to mean the "exclusive right of multiplying copies of a work already published." This right can only be preserved by complying with the act of congress for that purpose. The word has sometimes also been used to denote the right which an author has in his literary work to keep it for his own private use, to publish it, or to refrain from publishing it, at his pleasure. This right exists at common law. It does not depend upon any statute. It can only exist

* Motion for leave to file amended petition overruled. See opinion, p. 771, *post*.

as long as the work is kept private. If it is published without complying with the copyright act the right is abandoned.

5. **Literary Property: CONTRACT.** The literary matter intrusted to the defendant to enable it to perform its contract with the state was not copyrighted, and had already been given to the public. Any citizen of the state had full right to print and sell the same on his own account. The law therefore will not imply an agreement on the part of the defendant not to manufacture and sell volumes containing such literary matter on its own account, there being no such limitation in the contract between the parties.

ORIGINAL action for damages for breach of contract. Defendant demurred. *Demurrer sustained and action dismissed.*

Norris Brown, Attorney General, and W. T. Thompson,
for plaintiff in error.

Hall, Woods & Pound, contra.

SEDGWICK, C. J.

When the ruling upon the second demurrer was sustained for the reasons stated in the opinion, 75 Neb. 275, a motion for a new trial was filed, this being an action brought originally in this court. Upon this motion the attorney general filed an able and exhaustive brief. The propositions of law advanced by him as showing that our former decision was wrong are vigorously supported both in his brief and upon the oral argument. Many decisions of other courts, both in this country and England, are cited and discussed with earnestness and ability. It became very manifest that, whatever might be thought of the conclusion reached by this court, the opinion filed had not served its intended purpose; it had not made plain the views of the court upon all the legal principles upon which a right determination of the case must rest. The case is an important one both on account of the amount involved, if the contentions of the state are sustained, and on account of the character of the allegations upon which the claim of the state rests.

In the brief filed and upon the argument the state admits that it has no claim "for infringement of copyrights or for damages for misuse of literary productions." The position taken by the state upon this point is stated in the brief in these words: "It is correctly stated in the opinion that all persons have a right to publish the decisions of this court. The West Publishing Company does so. It buys copies of the opinions from the reporter of this court. It edits its own manuscripts, sets its own type, makes its own plates, prints its own copies, binds them, and sells them openly to the public." We do not think that the counsel for the state have fully appreciated the quality and force of this admission. The importance of the fact so admitted must be continually borne in mind in the investigation and determination of the questions involved. The literary matter involved in these reports became the property of the public before the manuscripts, or any other property of the state, were placed in the hands of the defendant to enable it to carry out the terms of its contract with the state. The syllabi of the opinions are regularly published in the newspapers of the state as soon as the decisions are rendered, and frequently extracts from the opinions, and sometimes the opinions themselves, are also so published. Copies of the opinions as well as the syllabi are furnished to any and all parties desiring them upon payment for copying them, and no attempt is made to preserve any claim on the part of the state in these syllabi or opinions. It was therefore impossible that the defendant should cause any injury to the state by making this matter public.

What interest or right of the state then has been interfered with or damaged by the acts of the defendant? The answer of the state's brief is: "The state engaged in the enterprise of publishing the decisions of the supreme court for the purpose of creating a fund to buy books for the state library. * * * For the purpose of creating a fund to purchase books for the benefit of the state library the state has by statute made provision for engaging in

the business of publishing the supreme court reports. The care of the state library and the enterprise of publishing the supreme court reports for the benefit thereof has been by the constitution and statutes committed to this court and its officers. * * * The constitution and statutes, therefore, have placed on this court and the reporter the responsibility for the management of the state's enterprise of publishing the supreme court reports, and the judges of the supreme court constitute a board of directors of the law division of the state library. Both the library and the means of creating the funds by which it is kept up are exclusively within the jurisdiction and management of the supreme court and the reporter thereof. This official power carries with it the responsibility for the proper management of the publishing enterprise, the funds created thereby, and the library books when purchased." We do not coincide with the view that the main purpose of the statute is to establish a printing and publishing business to make profits with which to replenish the library funds. The purpose would seem rather to be to make the opinions of the court easily accessible to all the citizens. We will assume, however, for the purpose of this discussion, that one of the objects of the state was to realize a profit upon the sale of the reports, and that the intention was to use that profit for the benefit of the library fund.

1. The first point stated in the argument is: "Defendant accepted employment in the state's publishing enterprise, and thereafter could make no clandestine profit out of its employer's business, and such profit belongs to the state." It is not entirely clear whether counsel intended to urge that this rule is applicable more especially to publishing enterprises, or whether it is the relation of principal and agent which they are intending to present in the discussion of this proposition. The first case cited under this point in the argument is an old English case, in which the defendant was employed by the plaintiff to make copies of certain drawings, and, while in that employment,

made other copies on his own account. Then follows the citation of a large number of cases from the courts of this country, in which the general doctrine is held that the agent cannot, without the consent of his principal, acquire an interest in the subject matter of the agency adverse to the interest of his principal. After citing these cases illustrating the law of principal and agent, a case is cited involving the right of a photographer to sell or exhibit copies of photographs, and other cases not depending upon the law of principal and agent.

Let us first inquire how the law of principal and agent affects the determination of this case. As before stated, a great many authorities on this question are cited in the brief, but they are all substantially to the same effect. In *Cottom v. Holliday*, 59 Ill. 176, the court in its opinion used this language: "The duties and obligations of an agent are such that he cannot avail himself of any advantage his position may give him to speculate off his principal. All the profits or advantages gained in the transaction belong to the principal." This expression is copied in the brief as being applicable to the facts in this case, but to our minds the rule of law declared in *Cottom v. Holliday* has no application whatever to the case at bar. In that case Mr. Cottom had employed Holliday to buy for him a piece of land from one Ritchie. Mr. Holliday purchased the land, and reported to Mr. Cottom that the land cost more than in fact it really did, and so obtained from Cottom more money than he was entitled to. It was held that Holliday, being the agent of Cottom to transact this business, could not be allowed to "speculate off his principal" in such manner. In the case at bar the defendant was not employed as an agent to carry on a printing and publishing business for the state. Its contract was to manufacture certain plates and certain books for the state. When they were manufactured they were to be delivered to the state and the defendant paid a certain agreed price therefor. This was the special employment of the defendant by the plaintiff. It was not



acting as the agent of the state in making these plates and books. It did the work in its own name. The state could not be held responsible for any acts or omissions of the defendant, or any contracts entered into or liabilities incurred by it in carrying out this contract with the state. One who contracted with a wagon maker to make him a wagon, and loaned the wagon maker certain tools with which to do the work, could with equal reason claim to be the owner of, or have some property interest in, a second wagon made by the wagon maker from his own materials while he was engaged in the contract with his employer, on the ground that the wagon maker was his agent in the enterprise of making wagons and could not speculate on his employer's business. In *Cottom v. Holliday, supra*, it was said: "The law will not permit the agent, without the assent of his principal, to acquire an interest in the subject matter of the agency adverse to that of his principal." If the defendant was the agent of the state in the transaction set out in the petition, what was the subject matter of that agency? It certainly was not to conduct a publishing enterprise. If the subject matter of the agency was the plates and books to be manufactured and delivered to the state, then the defendant has not acquired or attempted to acquire any interest in such subject matter.

2. One of the oldest cases cited by the state, and a case which may be regarded as a leading one, is *Pulcifer v. Page*, 32 Me. 404, 54 Am. Dec. 582. In that case the facts were that the plaintiff and defendant each had an iron chain which had been broken into various pieces. The plaintiff took the pieces of the two chains to a blacksmith and had them united so as to make two other chains. The defendant took one of these chains, and the plaintiff brought the action to recover from him. The court in stating the case began with this expression: "This case presents a question of acquisition of property by accession, but does not involve an inquiry concerning the admixture or confusion of goods. It is a general rule of

law that if the materials of one person are united to the materials of another, by labor, forming a joint product, the owner of the principal materials will acquire the right of property in the whole, by right of accession." Counsel surely are not seriously contending that the principle involved in the case cited has anything to do with the case at bar. The materials of the state were the manuscript of the literary matter and the plates from the time the plates became the property of the state. No materials of the defendant were united to the materials of the state in any way. There was no joint product produced.

3. The proposition is stated in the brief that, when one employs another to manufacture pictures or books for him, the person so employed has no right to make any other copies for his own benefit. Several cases are cited as illustrating this proposition and its application to the case at bar. *Pollard v. Photographic Co.*, 40 L. R. Ch. Div. 345, is one of the cases relied on. That was an action to restrain the defendant "from selling, or offering for sale, or exposing by way of advertisement or otherwise a certain photograph of the plaintiff, Alice Morris Pollard, got up as a Christmas card, and from selling, or exposing for sale or otherwise dealing with such photograph." The lady was photographed at defendant's shop, and paid for a likeness of herself taken from negatives then made. "It was found by the plaintiff that a photographic likeness of Mrs. Pollard taken from one of the negatives, got up in the form of a Christmas card, was being exhibited in the defendant's shop window at Rochester." In the course of the argument one of the judges remarked: "Injunctions have been granted to restrain a libel." The photograph was a private matter, it never had been published, and the attempt to publish it on the part of the defendant was the injury complained of. The case illustrates the doctrine of the right of privacy. This right of the plaintiff to prevent her photograph being made public against her wish was so well established in English law that it was unnecessary to discuss that right. The question dis-

cussed was whether she had waived that right by employing the photographer to make the negative without at the same time stipulating that he should not publish it, and the court held, after much discussion, that it was not necessary to make the express stipulation in the contract that they should not be published, that such stipulation would be implied, and this is the whole matter discussed in the case. The court referred to several other cases, some of which are cited and relied on by the state in this case, and then said that the cases referred to were the cases "in which there was some right of property infringed, based upon the recognition by the law of protection being due for the products of a man's own skill or mental labour." The court then stated that an English statute provides: "When the negative of any photograph is made or executed for or on behalf of another person for a good or valuable consideration, the person making or executing the same shall not retain the copyright thereof, unless it is expressly reserved to him by agreement in writing signed by the person for or on whose behalf the same is so made or executed; but the copyright shall belong to the person for or on whose behalf the same shall have been made or executed." So that by express statute in England the plaintiff had a right to her photographs, and might copyright them, if she chose. In this connection it will be remembered that the author of a manuscript is in this country not obliged to give it to the world, he may keep it as a private matter as long as he does not publish it, and at any time when he decides to publish it he may obtain a copyright thereon; so that, while he holds the matter unpublished, he has a special interest in it which would entitle him to prevent its publication. The English statute gave a similar right to one who was photographed to prevent the photograph from being made public. In the state's brief it is said that this case was followed by the United States circuit court for the district of Massachusetts in *Corliss v. Walker Co.*, 57 Fed. 434. In that case an injunction



was allowed in the suit of Mrs. Corliss to prevent the publication of a picture of Mr. Corliss, who was then deceased. Afterwards a motion was made to dissolve this injunction. This motion was sustained, and in passing upon this motion the court said: "But, while the right of a private individual to prohibit the reproduction of his picture or photograph should be recognized and enforced, this right may be surrendered or dedicated to the public by the act of the individual, just the same as a private manuscript, book, or painting becomes (when not protected by copyright) public property by the act of publication." *Corliss v. Walker Co.*, 64 Fed. 280. Distinctly holding, and construing *Pollard v. Photographic Co.*, *supra*, also as holding, that it is the publication of the photograph or writing that the law would prohibit, and that this right to so prohibit this publication is "surrendered or dedicated to the public * * * by the act of publication." These cases and other similar cases plainly have no application to the making of pictures or printing of matter that has already been given to the public.

Another case quoted from in the brief and strongly relied upon by the state is *Tuck & Sons v. Pricster*, 19 L. R. Q. B. Div. 629. In the syllabus the case is stated as follows: "The plaintiffs employed the defendant, who was a printer in Berlin, to make for them copies of a drawing of which they had the copyright. The defendant executed the order, and also, without the plaintiff's knowledge or consent, made other copies, and imported them into England. After this the plaintiffs registered their copyright under 25 & 26 Vict. c. 68, and after the registration the defendant sold in England some of the copies which he had imported." The court held: "There was an implied contract that the defendant should not make any copies of the drawing other than those ordered by the plaintiffs, and that, independently of the statute, the plaintiffs were entitled to an injunction and damages by reason of the defendant's breach of contract." It

is this holding that is quoted and relied on by the state. It is manifest that the meaning and force of this holding has been entirely misunderstood. These pictures had never been published. The plaintiffs were procuring them to be made for the purpose of disposing of them to the public for the profit of the plaintiffs themselves. Every principle stated in the opinion is inconsistent with the idea that the court was dealing with matters that had ~~already been given to the public~~. This fact must be kept in mind in ascertaining what was in reality decided in the case. Another important matter has been overlooked in the plaintiff's discussion. It is mentioned in the opinion of Lindley, L. J. He said: "I am quite aware of the ambiguity of the word 'copyright,' but that which is called 'copyright' at common law has been shown by the decision of the House of Lords in *Jefferys v. Boosey* to be an incident of property and nothing more. 'Copyright' under the act is something far beyond that; it is the exclusive right of multiplying copies of a work already published." In the discussion of the case before the divisional court the difficulties which have arisen from this ambiguous use of the word 'copyright' are plainly pointed out. The word has sometimes been applied to the "right to publish, or to abstain from publishing, a work not yet published at all." This is the common law right which every one has in his own productions, whether they be literary, ornamental or of a more substantial nature. He may keep them entirely to himself as long as he chooses, and, while he does so, he has an exclusive right to them, and no person has a right to interfere with them or destroy them. To make them public would be to destroy this right. This right is perhaps not strictly a copyright, but that name has frequently been applied to it, and in the case under discussion it is said by a majority of the court to be a copyright. Whatever it may be called, it is the registering of this right, or in our country the complying with the law in regard to copyright, which preserves the right in the work after it has been published.

Unless the copyright laws are complied with, publication works an abandonment of all further right. Grove, J., of the divisional court quoted the following language from Lord Brougham: "Whatever may have been the original right of the author, the publication appears to be of necessity an abandonment; as long as he kept the composition to himself, or to a select few, placed under conditions, he was like the owner of a private road; none but himself or those he permitted could use it; but when he made the work public he resembled that owner after he had abandoned it, who could not directly prohibit passengers, or exact from them a consideration for the use of it." *Tuck & Sons v. Priester*, 19 L. R. Q. B. Div. 48, 55. A further quotation is made from language used by Lord Brougham in speaking of a copyright in the sense of exclusive right of multiplying copies of a work already published, as follows: "That which was before incapable of being dealt with as property by the common law became clothed by the lawgiver's acts with the qualities of property, and thus the same authority of the lawgiver, but exercised righteously and wisely for a legitimate and beneficent purpose, gave to the produce of literary labour that protection which the common law refused it, ignorant of its existence, and this protection is, therefore, in my opinion, the mere creature of legislative enactment." These pictures had never been published. The court recognized the right which the designer and maker of the pictures had to keep them for his own private use, and to publish them or refrain from publishing them at his pleasure. That right, which was independent of their statute, was violated by the defendant, and the discussion is as to whether under the circumstances there was an implied contract that the defendant should not violate that right. The court found that there was such an implied contract and so allowed the plaintiff to recover damages. After publication nothing but compliance with the statute will save the right. This is the ordinary and strictly proper use of the word copyright—the right to make it public and

still retain the beneficial interest in it. No right remains in a literary production which has been made public, except under the federal copyright act. This is the sense in which the word copyright was used in the former opinion. The fact that the state had dedicated to the public the literary matter embraced in the manuscript furnished to the defendant, by furnishing it to the West Publishing Company for publication, and in various other ways pointed out above, was not denied in the petition and was understood by all parties. Upon this understanding the case was presented to the court. Upon the theory that this was private matter, and had never been dedicated to the public, the proposition of law involved in the first paragraph of the former opinion would not be technically correct, and the same might be said of some of the expressions of the opinion. ✓

The case of *Murray v. Heath*, 1 Barn. & Ad. (Eng.) 698, was decided in England in 1831. The plaintiff delivered certain drawings to the defendant to be by him engraved on copper plates for the plaintiff's sole use. The defendant engraved the drawings for the plaintiff, but while the drawings and copper plates were in the hands of the defendant he took off impressions on paper from the plates for his own use, and this was the foundation of the action against him. In the first count against the defendant it was alleged "that the plaintiff was possessed of and had the right to the sole use of" the drawings in question; and, in the seventh count, "that the plaintiff was entitled to the pecuniary profit, benefit, and advantage to be derived in any way from all impressions taken and to be taken" from the copper plates; and, in the eighth count, "that the plaintiff was the *proprietor* of certain prints, which had been etched and engraved (named them), and had and was entitled to the sole right and liberty of printing and reprinting the same." The other counts are not set out in the opinion. These allegations in these three respective counts do not appear to have been denied. No question was made in regard to these allegations. They

were necessary and material allegations, and if the drawings had been published these allegations would have been untrue. In that case the public, and any person that desired to, would have the liberty of printing and reprinting the same, and the plaintiff would have no such sole right. Upon the theory, however, that the allegations were true, and that the plaintiff did have the sole right, and that "the engraver had contracted to engrave the plate, and to appropriate the prints taken from it to the use of another, an action at common law would lie against him from the breach of that contract." If the engraver took copies of these drawings and offered them for sale to the public, such an injury would require no act of parliament to put an end to it. The court so declared in these words: "The injury complained of in this case required no act of parliament to put an end to it; for the engraver having contracted to engrave the plate, and to appropriate the prints taken from it to the use of another, an action at common law would lie against him for the breach of that contract." This expression of that court is quoted in the briefs and appears to be much relied on. It plainly has no bearing upon the right of the defendant in this case to copy and publish the supreme court reports. The state had the right in the manuscripts and in the plates, and the defendant did wrong in using them without the consent of the state, and would be liable under suitable allegations for such injury as the state suffered by reason thereof. The contract between the plaintiff and the state was of such a nature that the agreement on the part of the defendant not to use the plates and manuscripts of the state for such purpose might be reasonably implied, because the defendant had no right to so use them; but we cannot imply from the contract an agreement not to do that which the defendant in common with all other citizens had full right to do. When the contract was made both parties must have known that the defendant had the right to obtain and publish the opinions of the supreme court. There was nothing in the contract incon-

sistent with that right, and no implication can be drawn from the contract that the defendant renounced or waived that right. The injury to the state, then, is in the use that the defendant has made of the manuscripts and plates, and does not arise from the manufacture and sale of the volumes of the reports, which the defendant might have done by other means and without the use of the plaintiff's property.

4. It is said in the brief that the rule contended for has been stated in a different form as follows: "Where material is delivered by the owner to a workman to be worked up, together with some additional materials to be furnished by the workman, into a manufactured article, the general doctrine is that the property in the finished product, including the accessorial material furnished, remains in the original owner." What material of the state has been worked up with other material into a manufactured article? The only "materials" delivered by the state to the defendant are the written manuscripts furnished, and the plates made by defendants for the state. Have these been worked up, together with some additional material, into books now in defendant's possession? Can such authorities be seriously regarded as applicable to this case?

5. It is argued that the court was wrong in holding in the former opinion that no confidential relations were created between the parties by the contract in question, except such as arises from ordinary contracts of employment or bailment. Without doubt the law will imply an agreement on the part of the defendant not to use for its own private purposes the property of the state, entrusted to defendant's care to enable it to carry out the contract; and, so far as defendant has done so, it is liable to the state for such damage as it has suffered on that account. The measure of such damages is pointed out, and we think correctly, in the former opinion. The state has a right to control the use of its own property, and, when by contract it places its property in the hands of its employees

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for a special purpose, the law, in the absence of anything in the contract to the contrary, will imply an agreement that the property shall be used only for that purpose. This is because any further use of it would violate the right of the state to control its use. This principle cannot extend to the making and selling the reports on defendant's own account, because this did not violate a right of the state. The state could not restrict the right of any citizen to make and sell these reports, because they had been already published, and were not copyrighted. If the state had required the defendant to stipulate in the contract that it would not make and sell any copies of the reports on its own account, it may be that such stipulation could have been enforced. The law will not imply such a stipulation in the contract, when, in fact, none exists, because the state had no private ownership in the literary matter; that private ownership, if any ever existed, having been waived and abandoned by publication. The state therefore had no right that could be violated by making and selling the reports, and there is no basis for the implication of an agreement on the part of the defendant that it would not make and sell reports on its own account.

We think that the judgment heretofore entered is right and it is adhered to.

DEMURRER SUSTAINED AND ACTION DISMISSED.

LETTON, J., dissenting.

The former opinion of the court, and the opinion of Chief Justice SEDGWICK, filed herewith, in substance, hold: (1) That the state has no literary property in the opinions of the supreme court so that the defendant or any other person can be restrained from printing and publishing the same upon its own account as an independent enterprise; (2) that the allegations of the petition with reference to recovery of damages are insufficient to support

an action at law for damages. So far I concur with the majority.

These propositions being settled there still remains the inquiry whether, under the conditions of the contract between the parties, the defendant has been guilty of, and is threatening such a violation of its terms as a court of equity will grant an injunction to restrain, on account of the inadequacy of the remedy by suit at law. The contract between the parties was entered into with knowledge by the defendant of the statute providing for the publication and sale of the supreme court reports. This statute became a part of the contract, of which the defendant was bound to take notice. It knew therefore that the purpose of the contract was to procure 1,000 copies of each original volume and 500 copies of each duplicate to be printed from the state's own plates furnished from its vaults, for the purpose of distributing a certain number of the copies to various officers and libraries, and of selling a much larger number, to create a library fund for the benefit of the state library. It was therefore fully aware that the preparation of the manuscripts, the indexing, editing, proof reading, and the arrangement of the contents of each volume was performed under the contract by the officers of the state for the pecuniary benefit of the state. This was not the only object, but it was one of the purposes of the contract.

It may be laid down as a general principle that no person has the right to use the property of another contrary to the will and against the interest of its owner. This rule applies with greater force where the property of one has been delivered to another under a contract to use it for certain specified purposes, and when the unauthorized use of the property for the benefit of the wrongful user would defeat the very object of the contract. When the state employed the defendant to print from its materials, furnished for the purpose, several thousand copies of supreme court reports, which the law prohibits the reporter of the supreme court from selling at less than a specified

price, if the defendant might use these plates and print an unlimited number of copies for its own use and sell at any price, the effect might be to deprive the state of any benefit from the contract and leave it with the books it had paid for a useless burden on its shelves. If such were the only force and meaning of the agreement, no man of ordinary business capacity would ever enter into it. Lord Holt said: "Every man's bargain ought to be performed as he intended it," and to believe that the contract entered into would permit such conduct on the part of the defendant would be to say that the state's officers were void of ordinary judgment.

With that portion of the opinion of Chief Justice SEDGWICK quoted hereafter I therefore concur: "The state had the right in the manuscripts and in the plates, and the defendant did wrong in using them without the consent of the state, and would be liable under suitable allegations for such injury as the state suffered by reason thereof. The contract between the plaintiff and the state was of such a nature that the agreement on the part of defendant not to use the plates and manuscripts of the state for such purpose might be reasonably implied, because the defendant had no right to so use them." And, further: "Without doubt the law will imply an agreement on the part of the defendant not to use for its own private purposes the property of the state, entrusted to defendant's care to enable it to carry out the contract. * * * The state has a right to control the use of its own property, and, when by contract it places its property in the hands of its employees for a special purpose, the law, in the absence of anything in the contract to the contrary, will imply an agreement that the property shall be used only for that purpose." I further concur in so far as the opinion holds that the fact that the defendant entered into the contract with the state in nowise deprived it of the right which it had, in common with every other citizen, to procure in the ordinary manner copies of the opinions of the supreme court, to arrange, index, correct the proof.

and otherwise prepare them for publication, and to print and publish them, since there is no private ownership in the literary matter of the opinions themselves. In fact, the only difference of opinion there seems to be between the majority of the court and myself is with reference to the remedy; their idea being that, by the violation of the implied contract, the defendant would become liable to the state only for the value of the unauthorized use of the state's materials and also for any injury done to the plates, while my view is that the legal remedy of damages, under all the circumstances of the case, is inadequate, and an equitable remedy necessary. Mr. Pomeroy says: "Where the agreement stipulates that certain acts shall not be done, an injunction preventing the commission of those acts is evidently the only mode of enforcement; but the remedy of an injunction is not confined to contracts whose stipulations are negative; it often extends to those which are affirmative in their provisions, where the affirmative stipulation implies or includes a negative. The universal test of the jurisdiction, admitted alike by the courts of England and of the United States, is the inadequacy of the legal remedy of damages in the class of contracts to which the particular instance belongs." 4 Pomeroy, Equity Jurisprudence (3d ed.), sec. 1341. See, also, 5 Pomeroy, Equity Jurisprudence, Equitable Remedies, sec. 270, and note 2. The rule is that, where there is a continuing breach of a negative covenant in a contract, and where an injunction against its violation will do justice and equity between the parties by compelling the defendant to carry out his contract according to the intention of the parties, or to keep him from reaping any profit or benefits from the breach of it, and where the remedy at law is not adequate, a court of equity will restrain the defendant from such a breach. *Western Union Telegraph Co. v. Union P. R. Co.*, 1 McCr. (U. S. C. C.) 558; *Singer S. M. Co. v. Union B. H. & E. Co.*, 1 Holmes (U. S.), 253; *Chicago & A. R. Co. v. New York, L. E. & W. R. Co.*,

24 Fed. 516; *New York Bank Note Co. v. Hamilton Bank Note, E. & P. Co.*, 31 N. Y. Supp. 1060; *Saltus v. Belford Co.*, 133 N. Y. 499; *Myers v. Steel Machine Co.*, 67 N. J. Eq. 300, 57 Atl. 1080; 2 Beach, Modern Equity Jurisprudence, secs. 769, 770. The question involved in this case is not one of copyright or of literary property, but is one of contract and the proper remedy for a breach thereof, and this is why I think much of my brother SEDGWICK'S opinion is not germane to the question involved.

From the nature of the contract it will be observed that the damages which may flow from its breach are almost impossible of ascertainment. They may continue for a long period of years by the defendant's glutting the market with the reports which it is alleged it printed in violation of its contract, and thus deprive the state of the opportunity to reimburse itself for the money which it has paid for the printing of the books. The difficulty of ascertaining or recovering any specific damages furnishes a foundation for the interposition of a court of equity. Can it be questioned that, if the defendant was still in possession of these plates and manuscripts, and was using and threatening to use them in printing copies of the reports for its own use with the intention of selling them at reduced prices, it could not be enjoined? If it can be enjoined from using these plates, and from using the editorial labors paid for by the state in the preparation of indexes and the arrangement of manuscripts in violation of the contract, why should it not be enjoined from selling the unauthorized copies and thus profiting by its breach of the contract?

To sum up, the contract implied by its terms a negative covenant or restriction that the defendant would not use the property and material of the state, furnished it for the purpose of executing the contract, in such a manner as to defeat the object of the agreement and against the interest of the state. It made a breach of this implied agreement. The ordinary remedies provided by a legal action are clearly inadequate and, hence, a court of equity

should enjoin any further violation of the implied contract. See Bispham, Principles of Equity (6th ed.), secs. 461-464.

Of course, this discussion has proceeded upon the assumption that the allegations of the petition are true. What the proof may show, if issues are made up, we cannot foresee.

In my opinion the petition states a cause of action in equity to enjoin a breach of contract, and the demurrer should be overruled.

The following opinion on motion for leave to file amended petition was filed March 7, 1907. *Motion overruled:*

Judgments, Vacating After Term. The provisions of sections 602-609 of the code apply to original actions in the supreme court.

The court therefore has no power or jurisdiction to set aside a judgment and allow the amendment of a petition, in its discretion, after the final adjournment of the term at which the judgment was rendered.

LETTON, J.

Application has been made during the present term of the court to file an amended petition in this case. A final judgment of dismissal, upon the demurrer to the petition being sustained, was entered at the September, 1906, term, since the plaintiff had formally announced that it would stand on its pleadings. The defendant contends that, since that term adjourned without further proceedings, the judgment entered was a final disposition of the case.

The action was brought under the original jurisdiction of this court, which is concurrent with that of the district court in like actions. Ordinarily a judgment of the district court, after the adjournment of the term at which it was rendered, becomes final. The power of the district court to vacate or modify its judgments, after the expiration of the term at which such judgments or orders are

made, is controlled by the provisions of sections 602-609 of the code. In *Huntington & McIntyre v. Finch*, 3 Ohio St. 445, it is said: "The court of common pleas has ample control over its own orders and judgments during the term at which they are rendered, and the power to vacate or modify them in its discretion. But this discretion ends with the term, and no such discretion exists at a subsequent term of the court." This rule has been repeatedly upheld in this state with reference to the powers of the district court. *Smith v. Pinney*, 2 Neb. 139; *McBrien v. Riley*, 38 Neb. 561; *Ganzer v. Schiffbauer*, 40 Neb. 633; *Schuyler B. & L. Ass'n v. Fulmer*, 61 Neb. 68; *Sherman County v. Nichols*, 65 Neb. 250. Section 610 of the code provides as follows: "The provisions of this title subsequent to section 601 shall apply to the supreme court and probate court, so far as the same may be applicable to the judgments or final orders of such courts." These provisions of the statute place it beyond the power of the court in an original cause at a subsequent term to set aside a judgment and permit an amendment of a petition, except in the manner and for the reasons prescribed in section 602.

Independent of these provisions, we are of the opinion that under the statutes we have no power to allow the amendment at this time. A discussion of the rules relative to original actions in the supreme court is to be found in *In re Petition of Attorney General*, 40 Neb. 402, and the conclusion is there reached that, since section 2 of the code provides there shall be but one form of action, and in section 903 it is provided that where the statute gives an action, but does not describe the mode of proceeding therein, the action shall be held to be the civil action of this code, therefore, original cases in this court must be governed by the rules of the code. If this action had been brought in the district court the right of the court in its discretion to set aside the judgment and to allow the plaintiff to amend its petition would expire with the term. As we have seen, both by the special provisions of section 610

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and by the general provisions of the code, this court is governed as to judgments in original actions by the rules pertaining to judgments in the district court, and, since if the judgment had been rendered in the district court its power to set the judgment aside would have ended with the term, so that of this court ended with the adjournment of the September, 1906, term, and we have now no power or jurisdiction to allow the amendment.

Leave to file an amended petition is therefore

DENIED.

LAWRENCE MCCONNELL V. STATE OF NEBRASKA.

FILED DECEMBER 21, 1906. No. 14,689.

1. **Criminal Law: EVIDENCE.** Bill of exceptions examined, and the evidence of the physicians contained therein found to be competent.
2. ———: **INSTRUCTIONS.** On the trial of one charged with a heinous crime, where the charge set forth in the information or indictment fully embraces all of the ingredients of a lesser offense, it is proper for the trial court to define the lesser offense and instruct the jury that, where the evidence requires it, they may convict of such offense, but a failure to so instruct is not reversible error, unless such an instruction is requested by the defendant.
3. ———: ———. An instruction in a prosecution for assault with intent to commit rape, which may be construed to mean that it is not essential to a conviction that the prosecutrix be corroborated, should not be given. And where it is probable that the rights of the defendant were prejudiced thereby a new trial will be granted. *Dunn v. State*, 58 Neb. 807, distinguished.

ERROR to the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Reversed.*

L. M. Pemberton and A. Hardy, for plaintiff in error.

Norris Brown, Attorney General, W. T. Thompson and S. D. Killen, contra.

BARNES, J.

Lawrence McConnell, hereafter called the defendant, was tried by the district court for Gage county on an information charging him with assault with intent to commit rape. He was found guilty and sentenced to the penitentiary for a period of seven years. To reverse that judgment he brings error to this court.

1. His first contention is that the court erred in receiving the evidence of Doctors Boggs and Fall as to the nature of certain stains found on the clothing of the prosecutrix. It is urged that this evidence was incompetent because the doctors did not sufficiently qualify themselves to testify as expert witnesses. While this question seems to be a close one, still we are of opinion that each of them showed such professional standing, knowledge and experience as required the court to receive their evidence for what it was worth, and the attack of counsel should have been directed to its weight, credibility and probative effect rather than its competency.

2. Defendant also claims, and strenuously insists, that the court erred in failing to instruct the jury that under the charge contained in the information the defendant, if the evidence warranted, might be found guilty of an assault and battery, or a simple assault. This assignment is argued with great force and at length. An examination of the record shows that the court failed to so instruct, and it also discloses that the defendant made no request for an instruction of that kind. That the charge of assault with intent to commit rape necessarily includes a charge of assault and battery and one of simple assault seems clear. In *Prindeville v. People*, 42 Ill. 217, the court said: "From all of the authorities, we are satisfied, that the general rule is, that, where a higher and more atrocious crime fully embraces all of the ingredients of a lesser offense, and when the evidence requires it, the jury may convict of the latter." And no case occurs to us which can come more fully within the rule than does as

assault with intent to commit rape. So, this is a proper case for the application of the rule contended for. We find, however, that the authorities are divided on that question, and, although it may be said that the weight of authority favors the defendant's contention, yet we are already committed to the rule that the failure of the court to give such an instruction is not reversible error, unless such request is tendered and refused. In *Barr v. State*, 45 Neb. 458, it was held: "In a prosecution for a felony error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged, unless requested so to do." In *Hill v. State*, 42 Neb. 503, we said: "Mere nondirection by the trial court is not sufficient ground for reversal on appeal, unless proper instructions have been asked and refused." The same rule is stated, without qualification, in *Gettinger v. State*, 13 Neb. 308, and in *Housh v. State*, 43 Neb. 163, also in *Edwards v. State*, 69 Neb. 386, and in many other cases. It may be said for this rule that it is not without reason for its support. It may happen that, where a defendant is charged with a heinous crime, and the evidence against him is slight, he would prefer to have the jury understand that he must be found guilty of the particular crime charged, or else not guilty. For in such a case the jury might well refuse to convict of the heinous crime, and yet readily agree to find the defendant guilty of a lesser offense, amounting, perhaps, to no more than a misdemeanor. By adhering to this rule we offer a defendant an opportunity to exercise his election, and have such an instruction by requesting the court to give it. So, we are of opinion that the defendant's contention on this point cannot be sustained.

3. Counsel for the defendant further contends that the court erred in giving paragraph 10 of the instructions on his own motion; that the effect of that instruction was to inform or at least lead the jury to believe that the defendant could be convicted without any corroboration of the evidence of the prosecutrix. We are fully committed to

the rule that in cases of rape and seduction the prosecutrix must be corroborated, or, in other words, the uncorroborated evidence of the prosecutrix is not sufficient to sustain a conviction, and we see no good reason, nor is any suggested, why the same rule should not prevail where the charge is assault with intent to commit rape. By the instructions complained of the jury were told, in substance, that in case of an assault with intent to commit rape it is not essential that the prosecuting witness should be corroborated by the testimony of other witnesses as to the particular act constituting the offense; that if the jury should believe, beyond a reasonable doubt, from the testimony of the prosecutrix, and the corroborating circumstances and facts testified to by other witnesses, that the defendant did make the assault, as charged in the information, the law does not require that the testimony of the prosecutrix should be corroborated by other witnesses as to what transpired at the immediate time and place when it is alleged the assault was made. The vice of this instruction seems to be that too much emphasis was given to the idea or thought that the prosecutrix need not be corroborated by the evidence of any other witness, and thereby the necessity of the corroboration was, in effect, lost sight of. Again, in this instruction the jury is first told that it is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense. Then follows the statement that if the jury should believe beyond a reasonable doubt, from the testimony of the prosecutrix, and corroborating circumstances, in fact testified to by other witnesses, that the defendant did make this assault, as charged in the information, the law does not require that the testimony of the prosecutrix should be corroborated by other witnesses as to what transpired at the time and place the alleged assault was made. This would seem to virtually tell the jury that there was sufficient corroborating circumstances and facts testified to by other witnesses to justify them, if they saw fit, in finding the defendant guilty. It is true the la-

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guage used does not necessarily have that meaning, but in the absence of any other instruction correctly stating the law in regard to the necessary corroboration the jury would probably be misled in regard to the matter. The record discloses that no other or correct instruction in regard to the necessity of corroboration was given by the court, and we think that the giving of the instruction complained of was therefore erroneous. While *Dunn v. State*, 58 Neb. 807, approves of a similar instruction, yet it is to be presumed that a correct instruction as to the necessity of corroboration was given in that case.

4. Lastly, it is contended, and strenuously urged, that the evidence is insufficient to sustain a conviction. While we have carefully reviewed it, yet we decline to express any opinion upon that question. It is quite probable that the case may be tried again, and it would therefore be improper for us to do so at this time.

For failure to correctly instruct the jury as to the necessity of corroboration and giving the paragraph of the instruction complained of, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

JOHN G. STETTER ET AL. V. STATE OF NEBRASKA.

FILED DECEMBER 21, 1906. No. 14,780.

1. **Criminal Law: PLEA IN ABATEMENT.** Where a plea in abatement in a criminal prosecution presents questions of law only, it is proper for the trial court to determine such questions without the intervention of a jury.
2. ———: **COUNTY COURT: JURISDICTION.** A county court or county judge has the same powers and jurisdiction in criminal matters as a justice of the peace, and may entertain a complaint, issue a warrant, conduct the preliminary hearing in a case where the offense is beyond his jurisdiction, and may hold the defendant to bail for his appearance in the district court.

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3. **Statutes: ENACTMENT: EVIDENCE.** An enrolled bill, as found on file in the office of the secretary of state, bearing the signature of the legislative officers and approved by the governor, is *prima facie* evidence of its passage, and cannot be overthrown by the legislative journals where they are silent on that matter.
4. **Gaming: EVIDENCE.** *Held*, That the evidence contained in the bill of exceptions is sufficient to sustain a conviction for a violation of the provisions of section 215 of the criminal code.

ERROR to the district court for Cherry county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Allen G. Fisher and A. M. Morrissey, for plaintiffs in error.

Norris Brown, Attorney General and W. T. Thompson. contra.

BARNES, J.

An information was filed in the district court for Cherry county against John G. Stetter and Harry F. Hilsinger, hereafter called the defendants, charging them with a violation of section 215 of the criminal code, which provides: "Every person who shall set up or keep any gaming table, faro bank, keno, or any kind of gambling table or gambling device or gaming machine of any kind or description, under any denomination or name whatsoever, adapted, devised and designed for the purpose of playing any game of chance for money or property, except billiard tables, or who shall keep any billiard table for the purpose of betting or gambling, or shall allow the same to be used for such purpose, shall, upon conviction, be punished by fine of not less than three hundred dollars and not exceeding five hundred dollars, or be imprisoned in the penitentiary not exceeding two years." To the information they filed a plea in abatement by which they alleged, in substance, that they had never had or waived a preliminary examination, because the original complaint on which they were arrested was filed before the county judge of Cherry

county, and such officer had no jurisdiction to receive the complaint, to issue a warrant thereon or conduct a preliminary examination in the premises. They also alleged in said plea that the section of the statute on which the information was founded had never been legally or constitutionally passed by the legislature of the state, and for that reason was unconstitutional and void. The state filed an answer to the plea, and the defendants thereupon demanded a jury trial on the issues thus raised. This was denied by the court, and the defendants excepted. Thereupon the issues were tried to the court, and resolved against the defendants. Thereafter they filed what they called a plea in bar, which was overruled and a trial on the merits of the case was had to a jury. They were convicted, and sentenced to pay a fine of \$300 each, together with the costs of the prosecution, and from that judgment they have brought the case to this court by separate petitions in error.

1. Defendants now contend that the district court erred in not granting their request for a jury trial on their plea in abatement. This contention cannot be sustained. The plea presented no disputed question of fact. The questions raised thereby were questions of law, as applied to the record before the court, and arising on an examination of the original bill attested by the legislative officers, signed by the governor and found on file in the office of the secretary of state, together with the legislative journals concerning its passage. In such a case it is the duty of the trial court to determine the legal questions presented without the intervention of a jury.

2. It is claimed that the court erred in overruling said plea: First, because the county court or county judge was without jurisdiction as an examining magistrate, and therefore the defendants had never had or waived a preliminary examination; second, for the reason that section 215 of the criminal code is unconstitutional, because it was never passed by the legislature in the manner provided by law; that the title of the bill, attested by the legislative

officers, signed by the governor, and found on file in the office of the secretary of state, is different from the title of the bill introduced and passed by the legislature.

The first of these two questions was before us in *Ex parte Maule*, 19 Neb. 273, where it was held that a county judge has authority to receive a plea of guilty in a misdemeanor case, to render a judgment thereon of conviction within his jurisdiction, and enforce the same by imprisonment as in other cases of misdemeanor. The matter was before us again in the case of *In re Chenoweth*, 56 Neb. 688, where it was said that the criminal jurisdiction of a county court or county judge is the same as that of a justice of the peace. It will not be contended that a justice of the peace is not an examining magistrate, and so we are of opinion that the defendants' contention on this point is not well founded.

Defendants' counsel, however, devote most of their argument to the proposition that section 215 of the criminal code is unconstitutional. It may be conceded that this point is well taken, provided the record sustains the fact relied upon. It appears that on the trial of this question there was introduced a certified copy of the original bill containing the section in question, as found in the office of the secretary of state. This bill bears on its face a complete refutation of the claim made by the defendants. There was also introduced by the defendants a copy of the legislative journals relating to the passage of the act in question, and it is claimed that this evidence is sufficient to overthrow the evidence of the bill itself. On this question we are not without authority. In *State v. Frank*, 60 Neb. 327, it was held that the enrollment, authentication and approval of an act of the legislature are *prima facie* evidence of its due enactment. While the legislative journals may be looked into for the purpose of ascertaining whether a law was properly enacted, yet the silence of these journals is not conclusive evidence of the nonexistence of a fact which ought to be recorded therein regarding the enactment of a law. In the body of the opinion in that

case we find the following: "So, here, it must be made to affirmatively appear that amendments of the house bill in question were adopted by the senate and were not concurred in by the house.' The enrolled bill has its own credentials; it bears about it legal evidence that it is a valid law; and this evidence is so cogent and convincing that it cannot be overthrown by the production of a legislative journal that does not speak, but is silent. Such seems to be the conclusion reached by a majority of the courts; and such, certainly is the trend of modern authority. To hold otherwise would be to permit a mute witness to prevail over evidence which is not only positive, but of so satisfactory a character that all English and most American courts regard it as ultimate and indisputable." Again in *Colburn v. McDonald*, 72 Neb. 431, the same question was presented, and it was there said: "The silence of the legislative journals is not conclusive evidence of the nonexistence of a fact, which ought to be recorded therein, regarding the enactment of a law.' *State v. Frank*, 60 Neb. 327. In order to overthrow such enrolled bill, it must be made to affirmatively appear by the journals that it did not pass." We find nothing in the copy of the senate and house journals relating to the passage of the act in question that shows any change or amendment, nor is there any affirmative showing therein that the bill, as introduced originally in the senate, was not properly passed. So we are of opinion that the defendants' plea in abatement was properly overruled. It is contended, however, that a former attorney general was of the opinion that the law was not properly passed. And, again, it is said that the defendants should not be punished, because the city council had passed a resolution allowing gambling to be conducted in the saloons of the city of Valentine. But these propositions are practically abandoned by the defendants, and do not deserve our serious consideration.

3. Counsel for the defendants contend, in a general way, that the evidence is not sufficient to sustain the verdict.

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This has compelled us to carefully read the bill of exceptions. It seems to be an undisputed fact that the gambling devices found by the sheriff in the possession of the defendants when he arrested them, were in a building situated in Valentine, Cherry county, Nebraska, occupied by defendants at that time, and for several months prior thereto, as a saloon. The evidence also shows conclusively that there had been what is commonly called a "poker table," together with cards and chips, in the back room of the saloon; another such table, together with what is called a "roulette wheel," in the back end of a pool room occupied by the defendants for more than a year prior to the time of their arrest. And it was shown by the testimony of seven apparently reputable witnesses that these devices had all been used in playing games for money, frequently, during all that time. So we are constrained to hold that the evidence is amply sufficient to sustain the verdict.

From an examination of the whole record we are satisfied that the defendants had a fair and impartial trial, and, finding no reversible error therein, the judgment of the district court is

AFFIRMED.

JAMES L. GANDY V. STATE OF NEBRASKA.

FILED DECEMBER 21, 1906. No. 14,884.

1. **Witness, Bribery of:** INFORMATION. An information for the crime of attempting to corrupt a witness must allege that the person sought to be corrupted was a witness; that the defendant knew such person to be a witness, or must state such facts constituting the offense as show conclusively that the defendant had such knowledge.
2. ———. One who has not been summoned or recognized as a witness in a pending suit, and who is not acquainted with either of the parties thereto, and has no knowledge of any fact either direct or collateral which may be the subject of inquiry therein, is not a witness within the meaning of section 164 of the criminal code.

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8. ———: EVIDENCE. On the trial of one charged with the crime of attempting to corrupt a witness, it is reversible error to allow the state to introduce evidence tending to show that the defendant offered a person the sum of \$500 to steal a written instrument called a certain power of attorney, where the information contains no charge of that kind or nature.

ERROR to the district court for Nemaha county: JOHN B. RAPEL, JUDGE. *Reversed.*

Edwin Falloon, C. F. Reavis and S. P. Davidson, for plaintiff in error.

Norris Brown, Attorney General and W. T. Thompson, contra.

BARNES, J.

James L. Gandy, hereafter called the defendant, was convicted of a violation of section 164 of the criminal code, which provides: "If any person shall attempt to corrupt or influence any juror or witness, either by promises, threats, letters, money, or any other undue means, either directly or indirectly, every person so offending shall be fined in any sum not exceeding \$500 or imprisoned in the penitentiary not more than five years nor less than one year." From the judgment and sentence of the district court for Nemaha county based on such conviction he brings the case to this court by a petition in error. His petition contains a large number of assignments, but few of which will be considered in this opinion.

1. The first question to be determined is defendant's contention that the trial court erred in overruling his demurrer to the amended information. It is urged that the omission to allege that the defendant knew the person sought to be corrupted was a witness renders the information fatally defective. In support of this our attention is directed to the case of *State v. Howard*, 66 Minn. 309, where it was said: "An indictment for the crime of offering a bribe to a juror, under the provisions of Gen. St.

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1894, sec. 6348, must directly allege that the person to whom the bribe was offered was a juror; that the defendant knew it; also, what was offered, naming it, and the fact that it was of value; and that it was offered with intent to influence the action of the juror as such." An examination of the Minnesota statute discloses that, like our own, it fails to set forth all that is essential to constitute the offense intended to be punished. It will be observed by an examination of the section of our statute on which this prosecution is founded that it simply names or defines the crime sought to be punished by its legal result, and does not purport to set forth all of the elements of the offense. In such a case an indictment or information in the words of the statute is not sufficient. *State v. Carpenter*, 54 Vt. 552; *State v. Smith*, 11 Or. 205, 8 Pac. 343; *Collins v. State*; 25 Tex. Supp. 204. And this does not conflict with the other well-established general rule that an indictment or information for a statutory crime is generally sufficient if it follows the language of the statute, for this is the exception to such general rule. It is claimed by the state, however, that *Chrisman v. State*, 18 Neb. 107, announces a contrary doctrine. We do not so understand that decision. The question there decided was whether the indictment charged that the person sought to be corrupted was a witness. And it was held that the language of the indictment was sufficient to so charge. It may be stated, in passing, that the indictment in that case contained the allegation that the defendant well knew that the person sought to be corrupted was a witness. We are therefore of opinion that in such case the information should charge that the defendant knew the person sought to be corrupted was a witness, or should contain such a statement of facts as would lead to the irresistible conclusion that the defendant had such knowledge. The information in this case charges in express terms that Fisher was a witness in the civil case of *Gandy v. Estate of Bissell* (deceased), and then sets forth facts relating to the conduct of the defendant which, if true, show conclusively that

he knew Fisher was to be a witness in that case. We therefore hold that the information is sufficient to charge a violation of the section in question, and the demurrer thereto was properly overruled.

2. It is also contended that the evidence does not support the charge contained in the information and is insufficient to sustain the verdict, for the reason that it shows conclusively that Fisher was not a witness within the meaning of section 164 above quoted. This requires us to determine who is a witness within the meaning of the statute on which this prosecution is founded. A witness, in the strict legal sense of the term, means one who gives evidence in a cause before a court. *Barker v. Coit*, 1 Root (Conn.), 224. In 29 Am. & Eng. Ency. Law (1st ed.), p. 533, note, it is said a witness is "a person who, being present before a court, magistrate, or examining officer, orally declares what he has seen or heard or done relative to a matter in question." When the books speak of a witness, they always mean one who gives oral testimony. *United States v. Wood*, 14 Pet. (U. S.) 455. In *Bliss v. Shuman*, 47 Me. 248, it was said: "The word witness is a most general term, including all persons from whose lips testimony is extracted to be used in any judicial proceeding." If we were to apply this rule, it could not be contended for a moment that Fisher was a witness. It is our opinion, however, that the word "witness," as used in the statute in question, should receive a broader and more general definition. 8 Words and Phrases, p. 7511, defines a witness to be one who has knowledge of a fact. See, also, *State v. Desforges*, 47 La. Ann. 1167, 17 So. 811. A witness is one who has knowledge of a fact or occurrence sufficient to testify in respect to it. *In re Losce's Will*, 34 N. Y. Supp. 1120. We are unable to find a broader and more general definition of the word than those above quoted. Applying this rule to the facts disclosed by the evidence in this case, we are satisfied that Fisher was not a witness within the meaning of the statute. He testified

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positively that he was a stranger in Nebraska, that he had never heard of the case of Gandy v. Estate of Bissell; that he never knew any of the parties to the action; that he knew nothing in regard to any fact relating to it; and that he never intended to be a witness in that case. His evidence was that Gandy sought to induce him to become a witness; that he paid him a certain sum of money, trifling in amount; told him to go to the house of one of his tenants, and that later he would tell him what he wanted him to testify to. He also said that Gandy offered him \$500 to steal a certain writing, called "a power of attorney," from one Hawley, who he was told was a witness in the case above mentioned. So, it is apparent that, if the evidence of the prosecution is true, when Gandy approached Fisher he (Fisher) was not a witness within the meaning of the statute, and never intended to become one. So, it would seem that the defendant's contention that the evidence discloses an attempt to suborn perjury, and does not support a charge of attempting to corrupt a witness, is well founded. While the action of the defendant was reprehensible in the extreme, and well calculated to pervert justice, yet we are satisfied that it is not covered by the statute under which the prosecution is brought. The facts of the case present a matter for proper legislative rather than for judicial action. So, we are of opinion that the evidence in this case is insufficient to support the verdict.

3. It is further contended that the court erred in permitting the witness Fisher to testify, over proper objections, that the defendant offered him \$500 to steal the power of attorney above mentioned. An examination of the information discloses that no such charge is contained therein. Neither is that matter mentioned in setting out the facts constituting the crime charged. So while it is not necessary to determine this question, yet it is not improper for us to say that the rule is quite general that to receive evidence on the part of the prosecution of facts tending to prove other and extrinsic charges which relate

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to some offense not contained in the information, on the trial of one charged with crime, is reversible error.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

DODGE COUNTY, APPELLEE, v. SAUNDERS COUNTY,
APPELLANT.*

FILED DECEMBER 21, 1906. No. 14,729.

1. **Counties: BRIDGE REPAIRS.** A county which refuses to enter into a contract with an adjoining county to repair a bridge across a stream dividing the counties is liable to the county making the repairs under contract for "such proportion of the cost of making said repairs as it ought to pay, not exceeding one-half of the full amount so expended," when the county making the repairs has followed the procedure pointed out by the statute as to notice, etc.
2. ———: ———: **NOTICE.** Where the only notice served under the statute notified the adjoining county that a bridge across a stream dividing the two counties was "unsafe for public travel and that same must be repaired to make it safe for public passage," the county so notified cannot be compelled to contribute toward the cost of new ice breaks not specified in nor contemplated in the notice, and not necessary to make the bridge safe for public travel.
3. ———: ———: **ISSUES.** Where the proper steps have been taken to render an adjoining county liable for the repair of such a bridge, and where an issue is raised as to the necessity of the repairs or as to the amount paid being more than the actual and reasonable cost thereof, then the amount that the defaulting county ought to pay is a question for the jury, but, if no such issue is tendered, the county in default is liable for one-half of the cost of repairs.
4. ———: ———. The fact that a bridge across the Platte river where it divides the counties of Dodge and Saunders is not one con-

* NOTE.—On motion to modify this opinion, it was ordered that judgment of lower court be affirmed upon appellee filing a remittitur of amount of judgment in excess of \$150 and interest.

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tinuous structure, but consists of two separate portions separated by an island, one of which portions is entirely within Dodge county, does not, under the circumstances, relieve Saunders county from the burden of contributing to the repair of the entire structure.

APPEAL from the district court for Saunders county:
LINCOLN FROST, JUDGE. *Reversed.*

M. B. Recse, B. E. Hendricks and Simpson & Good, for appellant.

J. W. Graham and Stinson & Martin, contra.

LETTON, J.

This action has been here before to review a judgment of dismissal rendered upon a demurrer to the petition being sustained. 70 Neb. 442, 451, 454. The judgment of the district court was reversed and the cause remanded for further proceedings, and from a judgment for plaintiff upon a jury trial the defendant appeals.

The substance of the petition is set forth in the first opinion. 70 Neb. 412. The defendant answered, alleging that the bridge is wholly within the county of Dodge; that the Platte river does not divide the two counties; that there is a large island lying within the county of Dodge, separated from Saunders county by a stream of the width of 175 feet; that Dodge county maintained a highway across said island to another bridge of much greater length, remote from the line dividing the two counties, and that the defendant is not liable for the cost of maintaining or repairing said north bridge, it being wholly within the county of Dodge. The reply was a general denial, with an admission of the existence of the island, and an allegation that that portion of the Platte river north of the island is about 2,600 feet wide; that portion south of the island 220 feet wide, and the island itself, where the bridge is located, 1,900 feet wide. It appears that the cost of the repairs upon the short bridge south of the island was \$30.

and that the cost of the repairs and ice breaks on the north bridge was \$964, of which sum \$775 was expended in building ice breaks, which were placed at a distance of about 30 feet up stream from the bridge. These ice breaks, consisting of piling and caps, were new, though there were some old ice breaks in existence in places which were connected with the bridge and extended some 20 feet up stream. After the evidence was taken, the court refused all instructions asked by the defendant and instructed the jury to return a verdict for the plaintiff for one-half of the cost of the work, being the full amount claimed. A motion for a new trial was overruled, judgment rendered, and from this judgment defendant appeals.

1. The first assignment of error is that the court erred in compelling the jury to include in their verdict one-half of the cost of the new ice breaks. On August 11, 1899, the county board of Dodge county passed a resolution reciting that it appeared that the Platte river bridge south of Fremont and the Platte river bridge at North Bend, between Dodge and Saunders counties, are out of repair and should be repaired forthwith, and providing that the county commissioners of Saunders county should be notified that the aforesaid bridges "are unsafe for public travel, and that the same must be repaired forthwith to make the same safe for passage by the public," and requesting that board to fix a time and place to meet, for the purpose of providing all arrangements for making a joint contract for the needful repair of the bridges, and further providing that, if the Saunders county board refused to fix a time or place within 20 days after the service of these resolutions, said board would proceed to advertise for bids, and would hold Saunders county liable for one-half of the cost of said repairs as provided by law. It further appears that service of a copy of these resolutions was made upon the chairman of the board of county commissioners of Saunders county. No heed being paid by the board of Saunders county to this notice, the county clerk of Dodge county advertised for bids for repairs under the

direction of the Dodge county board, and included therein "five ice breaks in north channel at Fremont." After due notice a contract was awarded to one F. H. Wallace, whose bid for the ice breaks was \$778. The notice served upon Saunders county contained no indication that any new ice breaks were to be constructed, but only provided for "the needful repair of said bridge to make the same safe for passage by the public." It is apparent from the evidence that substantial ice breaks were proper and necessary to be constructed at a short distance up stream from the north bridge in order to preserve the same from injury or destruction by moving ice. It is contended that these ice breaks are not repairs, and that they are not necessary for the purpose of repairing the bridge and making it safe for public travel. Whether this be so or not, it is very clear that their construction is not within the terms of the notice served upon Saunders county. It may well be that the county board of Saunders county was willing to entrust the expenditure of the amount of money necessary for "the repairing of the bridge and making it safe for passage" to the discretion of the county board of Dodge county, and therefore took no action, but that if it had been notified that the expenditure of nearly \$800 was contemplated in the building of new ice breaks, it would have appeared at the time and place mentioned in the notice for the purpose of participating in the discussion as to the propriety and advisability of letting a contract for such purpose. However this may be, we think that the liability of Saunders county to contribute to the cost of building these ice breaks rests upon the question whether the county board of that county was notified that it was the purpose to make such improvements, and that a notice that the bridge is "unsafe for public travel and must be repaired forthwith to make the same safe for passage" is too narrow to impose such a liability upon it.

The defendant contends that under the statute the question of what proportion of the cost of making repairs Saunders county ought to pay should be submitted to a

jury for determination. In *Brown v. Merrick County*, 18 Neb. 355, decided in 1885, it was held that as the statute then stood there was no power in the county board of one county, in the absence of a joint contract, to erect or repair a bridge across a stream which divides counties and compel the other county to contribute. There was an attempt to amend the law made in 1881, but this act was unconstitutional and void, and a later amendment was made in 1899, which constitutes a part of the act now in force, being the proviso to section 88, ch. 78, Comp. St. In *Cass County v. Sarpy County*, 63 Neb. 813, the enactment and force of these statutory provisions are considered and the conclusion arrived at that section 87, when considered alone, imposes the obligation to build and repair bridges mentioned therein upon both counties equally and without qualification; that section 88 provides the manner of making and entering into joint contracts for the purpose of building or keeping in repair such bridges, regulates the manner of procedure, and enforces the liabilities growing out of a neglect of duty in reference thereto; and that section 89 provides for the method of procedure when a contract or agreement has been made in regard to the bridge, and when the county board of either county neglects or refuses to build or repair. It is further pointed out that "under the act of 1879, as well as under the amendment, two kinds of contracts are authorized—one for the building of bridges, and one for the repair of such structures. To the subject matter of the former of these two classes the proviso makes no reference, but the subject matter of the latter of them is its one sole subject. It makes no regulation with respect to the construction of bridges, nor to the repair of them, in instances in which there is an existing contract for such repair." See, also, *Saline County v. Gage County*, 66 Neb. 839, 844; *Iske v. State*, 72 Neb. 278. If, as we have seen, the purpose of the proviso is to provide for the repair of bridges when no joint contract has been made between the counties, and section 89 provides only for the manner and measure of the recovery when a con-

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tract or agreement has been made between the counties, then this case is governed by the proviso, and not by section 89, since no joint contract was entered into between Dodge and Saunders county. Saunders county refused to enter into such contract. Dodge county then entered into a contract for the repairs, and is entitled to recover, as provided by the proviso, "by suit from the county in default, such proportion of the cost of making such repairs as it ought to pay, not exceeding one-half of the full amount so expended." The proviso must be construed in connection with section 87. We think the true intent of the statute is that in case an issue is raised as to the necessity of the repairs, or that the amount paid was more than the actual and reasonable value thereof, then that the county which is being sued is only liable for such proportion of the cost of the repairs as it ought to pay. The intention is that each county shall pay one-half of the reasonable cost of necessary repairs, and no more, and that the county making the repairs cannot recover one-half the amount expended by it, unless such amount is the reasonable cost of necessary repairs.

2. Another assignment of error is based upon the contention that under the law no part of the cost of repairs expended upon the north bridge is payable by Saunders county. It appears that the south boundary of Dodge county is the south bank of the Platte river, and that the island mentioned is entirely within the limits of Dodge county; that it contains from 160 to 180 acres; that it is the subject of private ownership, and taxes are assessed and collected upon it by Dodge county. The bridge across the north branch of the Platte connecting this island with the main land is 2,545 feet long. There are two bridges across the stream south of the island—one 264, and the other 278 feet long. The roads crossing the island from these two bridges to the main bridge are respectively 1,366 and 1,948 feet long, and are maintained and worked by Dodge county. It is strenuously urged by the defendant that since the statute refers to "streams" that divide

counties, and since the south branch of the river is the only "stream" that divides Saunders county from Dodge county, the island and the north bridge being entirely within Dodge county, the former county is only liable to contribute to the repair of the bridge across the south channel, and that it was error to include in the recovery one-half of the cost of the repairs upon the north bridge. It seems that this question was attempted to be raised in a motion for a rehearing in this case, but the court held that the question could not arise upon demurrer, and that "conditions may be such that each part of the river, that part lying on the north side and that part lying on the south side of the island, should be considered a stream as that word is used in the statute." 70 Neb. 454. While it was said in the former opinions that by the word "stream" the legislature meant "river," we think that this was said with reference only to the question whether the Platte river divided the two counties. It is argued that it is unreasonable to suppose that the statute would make an adjoining county liable to contribute toward the cost of repairing bridges across every branch or channel of such a river, even though such branch or channel might be situated miles away from the dividing stream, as might well happen in the case of the spreading streams constituting the delta of a river. But this statute was enacted with reference to the conditions in the state of Nebraska, and the legislature had in mind the streams and rivers of Nebraska, and not those of some other state or country. It is reasonable to presume that one of the moving causes of the enactment of this law was the existence of the wide and almost unfordable channel of the Platte river extending for hundreds of miles through the center of this state, and having scattered along its channel many islands, some of but little extent, while others contain within their limits hundreds or perhaps thousands of acres of land. It would seem unreasonable to adopt a construction of the statute which would hold that, if a bridge should be built across the river a few feet from the extremity of an island, both

counties should contribute to its maintenance, while, if the existence of the island should be taken advantage of for the purpose of reducing the cost of the erection of a bridge or furnishing a better site therefor, one of the counties should be relieved from a large portion of the burden of keeping it in repair. At the locality in question it appears that, if a bridge had been erected at a point either immediately above or below this island, the length of the structure in either case would be greater than that of the combined length of the bridges over both the north and south channels. It is apparent, also, that the inhabitants of both counties share in the benefit derived from the entire length of the passage way across the river; that the use of the bridge across the south channel alone would be of little or no benefit to the citizens of Saunders county were it not connected with the north bank by the other portion of the bridge extending across the north channel. Moreover, it is evident that there is no such necessity for connection with the island by the inhabitants of Dodge county as would warrant the erection of a bridge for that purpose alone. It is possible that, where necessity for communication with an island of extended area would warrant the erection of a bridge for that sole purpose, an adjoining county would not be held to contribute to the cost of repairs on such a bridge, but such a case is not before us. We are of the opinion, therefore, that the cost of repairing the entire length of the bridge or bridges across both the north channel and the south channel should be borne by both counties.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

EDWARD BETTLE, JR., ET AL., APPELLANTS, V. JOHN F.
TIEDGEN ET AL., APPELLEES.*

FILED DECEMBER 21, 1906. No. 14,189.

1. **Mortgages: EQUITY OF REDEMPTION, PURCHASER OF.** A mere purchaser of the equity of redemption of mortgaged lands is given all the protection that the statute was designed to afford him, if he is permitted to deal with safety with one who appears by the record to be the owner of a mortgage securing a nonnegotiable debt.
2. ———: **ASSIGNMENT: PAYMENT.** In the circumstances disclosed by this record, the mortgagee was authorized to receive payment and discharge the lien, although the mortgage had been assigned and the assignment made of record before the payment was made.

APPEAL from the district court for Madison county:
JOHN F. BOYD, JUDGE. *Affirmed.*

Francis A. Brogan and M. J. Moyer, for appellants.

W. V. Allen and O. A. Abbott, contra.

AMES, C.

Tiedgen owned a tract of land upon which he executed a mortgage to secure a promissory note payable to the Omaha Loan & Trust Company. After the note had become due and had lost its negotiable character under the law merchant, the payee assigned it to the Boston Safe Deposit & Trust Company, soon after executing also to the latter company a formal assignment of the mortgage. Subsequently the Boston company sold and transferred the note and mortgage to the plaintiffs, who are still the lawful holders of them, but without formal assignment, except as already mentioned. The defendant Reimers became the owner of a second mortgage on the land and foreclosed it upon the equity of redemption, of which he

*Rehearing allowed. See opinion, p. 799, *post*.

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became the purchaser at judicial sale after the date of the transfer and assignment first above mentioned, but before the assignment was made of record in the county, and without knowledge or notice of it. Nor did he ever know of it actually or constructively, or of either of the sales and transfers of the securities, until after he had in good faith paid the amount of the mortgage debt to the payee named in the instrument, the Omaha company, unless he was charged with notice by the record of the assignment several months after he had acquired title to the equity of redemption, in manner aforesaid, and his sheriff's deed had been made of record, and he had gone into possession of the land. The Boston company, at all times after it had disposed of the paper, was the agent of its assignee, the plaintiffs, for its collection, and payment to it would have discharged the debt, but the Omaha company became insolvent, and never remitted the money paid to it by Reimers for the satisfaction of the lien.

The facts thus briefly stated and their legal effect, as thus indicated, are, as we understand, not in dispute. They gave rise to the first of two questions presented by this record of the dismissal by the district court of an action to foreclose the mortgage. The case reached this court by appeal. This question, which was debated at length by counsel both in their briefs and orally at the bar, is whether Reimers is a subsequent purchaser within the meaning of section 16, ch. 73, Comp. St. 1903, and, as such, charged with constructive notice of the transfer of the paper by the record of the assignment before he made his payment. There is good reason for regarding him as such. This court held in *Ames v. Miller*, 65 Neb. 204, that an assignment of a mortgage is, without doubt, a "deed" within the meaning of section 46 of the statute because it affects the title to, and transfers an interest in real estate, and is entitled to be made of record by the provisions of the act. This being so, one who purchases a release or surrender of the interest and becomes also entitled to an instrument of record evidencing that fact

must, under the circumstances of the case at bar, be regarded as a subsequent purchaser of it and bound by record notice that his vendor had already parted with his title thereto. It will be observed that section 39, ch. 73, *supra*, exempts from the constructive notice of the record of the mortgage three classes of persons only, namely, mortgagors and their heirs and personal representatives; but a purchaser of the equity of redemption who does not become obligated for the payment of the mortgage debt is a mere volunteer, who may or may not afterwards purchase, also, the outstanding lien or interest, and whose intention in that regard the mortgagee or his assigns can have no certain means of ascertaining. In fact, it was admitted in argument that for a considerable time after Reimers acquired the equity of redemption he had no fixed or formed intention with respect to the payment of the mortgage lien in suit, and for that reason expressly declined to enter into an agreement for the extension of the debt. Under such circumstances he can hardly be regarded as a "personal representative" of the mortgagor, who is still living and a party to the suit. We think that, in view of the decisions of this court, a mere purchaser of the equity of redemption of mortgaged lands is given all the protection that the statute was designed to afford him, if he is permitted to deal with safety with one who appears by the record to be the owner of a mortgage securing a nonnegotiable debt. *Eggert v. Beyer*, 43 Neb. 711.

The remaining question is one of fact, concerning which, however, the evidence is not conflicting, viz.: Was the Omaha company an agent of the Boston company for the collection of the debt in controversy, it being admitted by counsel, as we understand them, that such an agent would have possessed authority to bind the plaintiffs also? This question should, we think, be answered in the affirmative. The transaction and manner of dealing between the Omaha company and the Boston concern, briefly stated, was this: The former executed its obligations, called "debentures," to the latter for a loan of money, and de-

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posited with the latter a very large number of notes, secured by mortgages to itself, as collateral security for the loan. The collateral notes appear not to have been indorsed and delivered under the law merchant, and that fact in this instance is significant, but were transferred by an assignment embodying a guaranty of collection of the principal, and of subsequently accruing interest thereon, and evidently not intended, or having the legal effect, to give the paper currency in the market. The arrangement extended over a considerable term of years. The course of business between the parties which seems to have been contemplated, though not set forth in detail, by their written contract was that, whenever any of the pledged obligations became due, or were about to become so, they were returned to the Omaha company, which was afforded an opportunity for 60 days to secure their payment or renewal, and to substitute with the Boston company new and underdue obligations in their stead. The business of making loans, collections and renewals was carried on by the Omaha concern and in its name exclusively, formal assignments not being made of record, and the connection of the Boston company with the paper, or its name even, not being made known to the borrowers and mortgagees or other persons with whom the Omaha company dealt. A very large volume of business was carried on for a long time in this way, and this was the way in which the mortgage in suit was dealt with, except that after the Omaha company became insolvent, or it was about to become so, the assignment mentioned above was executed and filed for record. The undertaking by and between the two corporations was a joint enterprise for mutual gain very closely resembling a partnership. The Boston company furnished the money capital for a definite share of the profits under the name of interest, and for the residue thereof the Omaha company conducted the business, and as between the parties, incurred, to the extent of its financial responsibility, the sole risk of loss. The principles applicable to such an association are elementary and

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familiar. Each member is obligated by the conduct of every other in the transaction of the affairs of the concern.

We are therefore of the opinion that the judgment of dismissal was not erroneous, and recommend that it be affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of dismissal be

AFFIRMED.

SEDGWICK, C. J. I concur in the conclusion reached.

The following opinion on rehearing was filed June 4, 1908. *Judgment of affirmance vacated and judgment of district court reversed:*

1. **Mortgages: EQUITY OF REDEMPTION, PURCHASER OF.** "A mere purchaser of the equity of redemption of mortgaged lands is given all the protection that the statute was designed to afford him, if he is permitted to deal with safety with one who appears by the record to be the owner of a mortgage securing a nonnegotiable debt." *Bettle v. Tiedgen, ante*, p. 795, adhered to.
2. —: **ASSIGNMENT: PAYMENT.** And where such purchaser pays the principal sum of a note and mortgage to the original mortgagee, after an assignment of such mortgage to a third party has been duly recorded in the office of the register of deeds of the county in which the lands described in such mortgage are situated, and the original mortgagee fails to pay over such money to the record assignee of the mortgage, such payment to said original mortgagee will not, in the absence of proof of agency, estoppel, or the like, operate as a discharge of the debt secured by such mortgage.
3. —: **FORECLOSURE: PLEADING: SUFFICIENCY.** An answer which alleges that on a certain day the defendant in a suit for the foreclosure of a mortgage, having no knowledge or notice of an alleged transfer of the note and mortgage, in order to relieve his premises of the apparent incumbrance thereby created, paid the original mortgagee the amount of said mortgage, and that the original mortgagee accepted said sum in full payment and satis-

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fraction of the note and mortgage sued on, and that at said time said original mortgagee had lawful authority to receive the same, does not constitute a plea of either agency or estoppel, and is not sufficient to entitle such defendant to prove that said original mortgagee, in accepting said payment, was acting as the agent of an assignee of said original mortgagee who had, prior thereto placed his assignment of said mortgage on record.

FAWCETT, C.

This is a rehearing of an appeal from a decree of the district court for Madison county denying a foreclosure of the mortgage in controversy and dismissing plaintiff's suit. On the former hearing we affirmed the judgment of the lower court.

The facts, briefly stated, are as follows: In August, 1891, defendant Tiedgen borrowed from the Omaha Loan & Trust Company, of Omaha, \$3,200, and as security therefor executed to said company the mortgage in controversy. The note which the mortgage was given to secure was payable five years after date. The Omaha Loan & Trust Company, which we will hereinafter designate as the Omaha company, sold the note and mortgage to some eastern investor, who carried the loan until its maturity, when, the note not being paid, the Omaha company, in compliance with its guaranty, repurchased the note and mortgage. No recorded assignment of either the sale or repurchase was made. Prior to the maturity of the note above referred to the defendant Reimers had commenced proceedings to foreclose a second mortgage upon the same property. Expecting that he would be compelled to purchase the property under his proceedings to foreclose his second mortgage, Mr. Reimers paid the last of the maturing interest coupons of the note secured by the first mortgage. After the maturity of the first mortgage note, and after it had repurchased the same, the Omaha company sent one of its employees, named Hayden, to see Mr. Reimers about their mortgage. Mr. Hayden requested Mr. Reimers to sign the necessary papers for an extension of the loan for another period of five years, but Mr. Reimers

was unwilling to sign any such papers, for the reason that he had not yet become the owner of the property, under his foreclosure proceedings, and might never become such owner. Hayden then stated to Reimers that he, Hayden, would execute the extension papers himself. To this Mr. Reimers made no objection, and upon his return to the office of the Omaha company Mr. Hayden did in fact execute the so-called extension agreement, extending the original Tiedgen note for a second period of five years from August, 1896. A number of years prior to the above dates, viz., on October 31, 1889, the Omaha company had entered into an agreement with the Boston Safe Deposit & Trust Company, of Boston, which we will hereinafter designate as the Boston company, in and by which agreement the Boston company agreed to act as trustee for the Omaha company to hold securities to be deposited with it by the Omaha company to secure the payment of debenture bonds or notes which might from time to time thereafter be issued by the Omaha company. By the terms of this trust agreement, before the Omaha company could issue debentures it was required to deposit with the Boston company real estate mortgages of a face value equal to the face value of the debentures to be issued by the Omaha company. On September 12, 1896, the Omaha company indorsed the original Tiedgen note as follows: "For value received, the Omaha Loan & Trust Company hereby assigns this note to _____ or order, and guarantees, first, the collection of the within note, and, second, the prompt payment of the coupons attached thereto," and delivered the note so assigned, together with the mortgage and extension agreement, to the Boston company. On July 17, 1897, Mr. Reimers became the owner of the real estate in controversy, by sheriff's deed issued to him in his foreclosure suit, subject to the outstanding mortgage of \$3,200; and from that time on until the maturity of the note according to the terms of the so-called extension agreement Mr. Reimers made the semi-

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annual payments of interest on the note to the Omaha company, and received from that company the interest coupons. From September 12, 1896, to February 1, 1898, the Boston company seems to have been holding the note and mortgage in controversy without any formal assignment of the mortgage. For some reason, not disclosed in the record, the Omaha company, on the last mentioned date, executed a formal assignment of the mortgage to the Boston company, which assignment was on February 12, 1898, filed for record in the office of the register of deeds in Madison county. Some time during July, 1901, Mr. Reimers, who was still the owner of the real estate, received a notice from the Omaha company that the principal sum of the note and the last maturing semi-annual interest coupon of \$96 would be due August 1. Mr. Reimers having been called to the state of Pennsylvania on business during the latter part of July, instructed his banker at Grand Island to remit to the Omaha company, for his account, the sum of \$3,296 to pay off the note and mortgage, which instruction his banker promptly obeyed, and sent the Omaha company a draft for that amount, which was received by the company on August 1, 1901. On his return home Mr. Reimers, under date of August 23, 1901, wrote the Omaha company as follows: "The canceled coupon No. 10 from my mortgage loan No. 6,986 is received, but I have not received release of mortgage and my note for \$3,200 which I have paid in full by remittance of F. N. Bank of Grand Island. Please attend to this at once, as I have sold the farm, and will need the release soon. Yours truly, John Reimers."

On August 31 Mr. Reimers again wrote the Omaha company as follows: "I wrote you a week ago about release of my mortgage No. 6,986, which was paid August 1, 1901. I have not heard from you since, and you will please attend to it, or notify me what is the matter." To this letter Mr. Reimers received the following answer: "Omaha, Sept. 3, 1901. Dear Sir: Please pardon delay in sending forward papers in your loan. The causes have

been on account of the absence of two of our clerks on vacation, one of whom has charge of all loans held behind debentures with our trustees. It is necessary to substitute another loan for yours. This will be done within a week or ten days."

When the Omaha company received the money from Mr. Reimers' banker, it did not remit the same to the Boston company, but deposited it to the general credit of the Omaha company on its open account in the Omaha National Bank of Omaha. On December 11, 1901, the Omaha company became insolvent, and passed into the hands of a receiver, who at once took possession of all of the assets of the company. The Boston company then, under the terms of its trust agreement, sold all of the notes and mortgages of the Omaha company which it then held as security for the debenture holders, the plaintiffs being the purchasers of the note and mortgage in controversy at such sale. Defendant Reimers refusing to pay plaintiffs the amount of the mortgage, claiming that he had already paid it once to the Omaha company, and that the Omaha company was entitled to receive the payment, this suit was commenced.

The order granting this rehearing reads: "Rehearing allowed on the question as to whether payment to the original mortgagee discharged the debt." By this ruling on the motion for rehearing, the further consideration of the case is limited to that one proposition. On the original hearing defendant placed great reliance upon our statute, which reads: "The recording of an assignment of a mortgage shall not, in itself, be deemed notice of such an assignment to the mortgagor, his heirs, or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee." Comp. St. 1905, ch. 73, sec. 39. Defendant argued that there was no evidence in the record of any actual notice of the assignment of the mortgage to Mr. Reimers, and that, under this section of the statute, constructive notice by the record of the assignment did not bind him. Our former opinion

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decides this point adversely to the defendant. Plaintiffs insist that that holding, not having been vacated by the order granting a rehearing, has now become the law of the case; while defendant insists that "there can be no law of the case invoked on rehearing." Be that as it may, our decision of this point in our former opinion is not only in harmony with our holding in *Eggert v. Beyer*, 43 Neb. 711, but, also with well considered cases from other courts (*Robbins v. Larson*, 69 Minn. 436; *Schultz v. Sroelowitz*, 191 Ill. 249; *Woodward v. Brown*, 119 Cal. 283; *Brewster v. Carnes*, 103 N. Y. 556; *Larned v. Donovan*, 155 N. Y. 341), and must be adhered to.

On the question now under consideration the defendant contends that the payment by Mr. Reimers to the Omaha company discharged the debt, for the reason that, by the course of the dealings between the parties, the questions as to whether or not the Omaha company was the agent of the Boston company for the collection of the debt, or whether the Boston company had knowingly permitted the Omaha company to hold itself out to the defendant as its agent for the collection of the debt, are questions of fact for the determination of the court, and that, in the light of the record before us, we cannot disturb the finding of the district court in favor of the defendant on that question. The questions of agency or estoppel are not raised by defendant's answer, and are, therefore, not available to defendant under the pleadings as they now stand. For a proper understanding of the situation of the parties in this respect we again refer to the trust agreement between the Omaha company and the Boston company. By the terms of that agreement, so long as the Omaha company promptly, and without any default, paid all maturing debentures of any series, and all instalments of interest upon any of such debentures, it was to have the right to collect, retain and use the interest upon all the mortgages which it had deposited with the Boston company, in the same manner and with the same effect as if such agreement had never been entered into. It will be seen, there

fore, that the fact that the Omaha company continued from time to time to collect the interest coupons from Mr. Reimers was not by sufferance of the Boston company, but by its own right; hence, no agency can be implied from that fact. The evidence shows that the Boston company at all times dealt with the Omaha company within the terms of the trust agreement. By the terms of that agreement the Omaha company had the right at any time within 60 days after the maturity of any note and mortgage which it had deposited with the Boston company to withdraw said note and mortgage, after having first substituted other notes and mortgages for an equal amount. The evidence shows that the Boston company never deviated from that condition of the agreement, but that, in every instance during the 12 years it continued to act as such trustee, before the Omaha company was permitted to withdraw a note and mortgage, it was required either to substitute with the Boston company other securities for an equal amount, or to make a cash deposit equal in amount to the amount of the securities withdrawn, and that the Boston company, in every such instance, held such cash deposit until the Omaha company made a proper substitution of securities as provided by the trust agreement. In the light of these facts, we are unable to see how the defense of agency could be claimed to have been established, even if it had been tendered by the answer.

Furthermore, we think the evidence shows that Mr. Reimers had received actual notice on numerous occasions that the Omaha Loan & Trust Company had parted with the principal note, and was no longer the owner and holder of the same. Every six months there was mailed to Mr. Reimers a notice that the interest on the loan would be due on a certain date, which notice contained this clause: "Please send to the address given above the herein stated amount of interest, by draft on New York, Chicago, or Omaha, post office order or by registered letter. Personal checks not accepted. The remittance should be made at this office as much as ten days before the interest is

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due, that it may reach the lender in the east on the day on which it is payable there. Prompt payment of interest is expected and required. Respectfully, W. I. Wyman, Treasurer. Return this notice with the funds. Coupons will be obtained and returned to you after payment. Notify this company of change of post office or of sale of land." Mr. Reimers testified that he never received these notices, but he admits that from the time of the execution of the so-called extension agreement in 1896, down to the maturity of the note, in 1901, a period of five years, he paid the interest to the Omaha company every six months.

We come now to the main point which compels us reluctantly we confess, to hold that, under the evidence now before us, the payment by Mr. Reimers to the Omaha company did not discharge the debt. The formal assignment of the mortgage on February 1, 1898, by the Omaha company to the Boston company was duly spread upon the records in the office of the register of deeds in Madison county on February 12, 1898. In the face of the notice thus given by the record of this assignment, Mr. Reimers could not, under the pleadings in this case, three and one-half years later, pay the principal sum of the note and mortgage in controversy to any but the Boston company. If he paid it to anyone else he did so at his peril. Having paid the money to the Omaha company we are compelled to hold that he thereby made the Omaha company his agent for the transmission of the money to the Boston company. The Omaha company having failed to do its duty in that regard, the loss must fall upon the one who was negligent in the matter. If, in the end, the defendant Reimers shall be compelled to pay this mortgage a second time, it will indeed be a great hardship. On the other hand, if the plaintiffs, who represent the holders of the debentures which were secured by this mortgage, and who took their debentures in good faith, relying upon the security deposited for their benefit, are defeated in this suit, then they will suffer a great hardship. It is a

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deplorable situation from either point of view, but there is no way by which we can relieve the case of the injustice which must be suffered by one side or the other. Whichever way it is ultimately decided, the loser will be a victim of misplaced confidence.

After a full discussion, we are all agreed that we ought not to enter a final judgment on this hearing, but that the cause should be reversed and remanded to the district court for further proceedings according to law.

CALKINS and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is vacated, the judgment of the district court reversed and the cause remanded for further proceedings according to law.

REVERSED.

W. F. CRITCHFIELD, APPELLEE, v. NANCE COUNTY,
APPELLANT.

FILED DECEMBER 21, 1906. No. 14,529.

Taxation: ASSESSMENT. The expression "money deposited in bank," as used in section 4 of the revenue act of 1903, is intended to include money on general deposit in bank.

APPEAL from the district court for Nance county: CONRAD HOLLENBECK, JUDGE. *Reversed.*

J. H. Kemp, for appellant.

W. F. Critchfield, pro se.

AMES, C.

On April 1, 1904, appellee was a depositor to the amount of \$1,000 in the First National Bank of Fullerton, in this state. He was also at the same time a debtor of the

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Union Stock Yards National Bank of South Omaha upon his promissory note for the same amount. The precinct assessor returned the amount of the deposit for taxation, refusing to set off against it the indebtedness upon the note. Appellee made an unsuccessful attempt to obtain such a set-off by the county board of equalization. He therefore appealed to the district court, by whom the set-off was allowed, and from the order of allowance this appeal is prosecuted by the county.

The first clause of section 28, art. I, ch. 77, Comp. St. 1903, requires of every person of full age and sound mind, being a resident of this state, that he shall list all his moneys for taxation, and section 4 of the same act enacts that "the word 'money' includes all kinds of coin, all kinds of paper issued by or under authority of the United States circulating as money whether in possession or deposited in bank or elsewhere." Money so deposited is expressly discriminated from a "credit," which is defined by section 5 to include "every demand for money, labor or other valuable thing, whether due or to become due." The first said clause of section 28 also expressly requires the listing specifically of all "moneys loaned or invested," and this court held in *Lancaster County v. McDonald*, 73 Neb. 453, that this latter mentioned requirement must be complied with, although the taxpayer may be indebted beyond the amount of such loans and investments. It seems to us quite clear, and it is also in harmony with the decision cited, that the legislature intended to require the listing of moneys in possession and on deposit, regardless of the indebtedness of the depositor.

We do not understand, indeed, that this proposition is controverted by counsel for the appellee, but he seeks to evade its force in the present instance by contending that, as this court has repeatedly held, one having a general deposit in a bank is a creditor of the bank, so he falls within the exception imported into the statute by construction in *Lancaster County v. McDonald*, *supra*, and that therefore the word "deposit," as used in section 4 of the statute,

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should be held to mean a special, but not a general, deposit. But the distinction appears to us to be too subtle and far-fetched. A special depository is merely a bailee, and his possession is the possession of his principal, so that the construction contended for would leave the word "deposited" in section 4 without any practical meaning whatever, for, of course, in the absence of special requirement, a taxpayer would be required to list all his money and property, whether in his own actual possession or in the custody of his agents and bailees. Besides, it is an elementary rule of construction that the words of a statute are to be understood in their ordinary and popular sense, unless the act itself discloses expressly, or by necessary implication, a different intent, and, by the expression of "money deposited in bank," without explicit qualification, is popularly and universally understood to be meant money on general deposit. The question is one solely of legislative intent, which does not appear to us to be in doubt or obscurely expressed, and we therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

REVERSED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v.
WILLIAM S. ELY.

FILED DECEMBER 21, 1906. No. 14,342.

1. **Railroads: DRAINS: DAMAGES.** Damages are recoverable by a landowner against a railway company for negligently maintaining an insufficient culvert or drain in an embankment, whereby his lands are flooded, although damages may have been recovered by

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plaintiff or his grantor for the location of the road, because the damages then recoverable were to be estimated upon the theory that the road would be constructed and maintained in a reasonably proper and skillful manner. *Chicago, R. I. & P. R. Co. v. Andreesen*, 62 Neb. 456, followed and approved.

2. *Cases Distinguished.* *Gartner v. Chicago, R. I. & P. R. Co.*, 71 Neb. 444, and *Fremont, E. & M. V. R. Co. v. Gayton*, 67 Neb. 32, examined and distinguished.

ERROR to the district court for Sarpy county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

M. A. Low and Woolworth & McHugh, for plaintiff in error.

H. Z. Wedgwood, contra.

OLDHAM, C.

This was an action instituted by the plaintiff, as lessee of a farm situated in Sarpy county, Nebraska, for damages to his growing crops caused by the overflow of a running stream. The grounds of the action were that the defendant railway company negligently constructed its roadbed so that it obstructed the channel of a stream of running water, and that by virtue of this obstruction the waters of the stream were dammed up and caused to flow back and remain on the land where the crops were growing, thereby causing a partial loss of all the crops growing on the leased premises. The answer of the company was in the nature of a general denial and a plea of estoppel, by reason of the fact that the defendant company had purchased the right of way across the premises from plaintiff's lessor, who was the owner of the land. On issues thus joined there was a trial to the court and jury, and a verdict and judgment for the plaintiff. To reverse this judgment defendant brings error to this court.

The only contention urged by the defendant railway company is that an action for damages for the overflow of the crops cannot be maintained by the lessee of the prem-

ises, for the reason that the obstruction is a permanent one which, unless interfered with by the hand of man, would continue indefinitely, and for this reason all damages, both past and prospective, are recoverable in but one action which must be instituted by the owner of the freehold. In support of this contention we are cited to the case of *Gartner v. Chicago, R. I. & P. R. Co.*, 71 Neb. 444. In this case the question at issue was whether or not a judgment, rendered in favor of the owner of the land for damages to the land occasioned by the construction of a permanent embankment in the building of the railway, was a bar to a similar action for damages to the land instituted by a subsequent purchaser. It was held that the damages to the land were indivisible, and a judgment therefor was binding on the plaintiff and his privies, but the question of damages to growing crops because of insufficient drainage was not involved in the controversy. The other case relied on is that of *Fremont, E. & M. V. R. Co. v. Gayton*, 67 Neb. 263, which was an action for damages to growing crops. But in this case the insufficient drainage and borrow-pits were all constructed on the lands owned by the railway company, and afterwards certain of these lands were conveyed to plaintiff's grantor and the point determined was that the grantee took the land subject to the visible burdens attached thereto at the time of the purchase. It was held that, "where a railroad company constructs its road across its own land and in so doing erects embankments and bridges and digs ditches and borrow-pits, by reason whereof surface water is or may be collected and discharged upon a particular portion of the track, subsequent grantees of that portion cannot maintain an action against the company by reason of the maintenance of such embankments, bridges, ditches and borrow-pits in their original condition."

It is clear neither of these cases is applicable to the facts in the case at bar, because this is not an action for injury to the land, but the rather for injuries to growing crops, which are admitted to be the property of the plain-

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tiff, who paid a cash rent for the use of the premises. And, again, the crops were not raised on lands which had been purchased by plaintiff's lessor, or any one else, from the railway company after the construction of the bridge and culvert complained of. We think that the undisputed facts place this case clearly within the rule announced in *Chicago, R. I. & P. R. Co. v. Andreessen*, 62 Neb. 456, in which it was said: "Damages are recoverable by a landowner against a railway company for maintaining an insufficient culvert or drain in an embankment, whereby his lands are flooded, although damages may have been recovered by plaintiff or his grantor for the location of the road, because the damages then recoverable were to be estimated upon the theory that the road would be constructed and maintained in a reasonably proper and skillful manner." The doctrine here announced was adhered to in the later case of *Chicago, B. & Q. R. Co. v. Mitchell*, 74 Neb. 563.

We are therefore of opinion that the trial court was fully justified in overruling defendant's request for a peremptory instruction directing a verdict in its favor, and we recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FIRST NATIONAL BANK OF BLUE HILL, APPELLEE, v. WEBSTER COUNTY, APPELLANT.*

FILED DECEMBER 21, 1906. No. 14,520.

Taxation: EQUALIZATION: APPEAL. On appeal from an order of a board of equalization in the matter of assessment of property for taxation, the cause must be tried on the questions raised by the complaint before that tribunal. *Nebraska Telephone Co. v. Hall County*, 75 Neb. 405, followed and approved.

APPEAL from the district court for Webster county:
ED L. ADAMS, JUDGE. *Affirmed.*

A. M. Walters and Bernard McNeny, for appellant.

L. H. Blackledge, contra.

OLDHAM, C.

This was an appeal from the board of equalization of Webster county on the question of the amount of real estate otherwise assessed that should be deducted from the capital stock, surplus and undivided profits of the First National Bank of Blue Hill. The assessment list furnished by the bank showed a total book value of the capital stock, surplus and undivided profits to be \$64,968.53. It also showed the value of the real estate assessed as such to be \$34,380, and personalty \$1,380, making a total of \$35,760, which, deducted from the above amount, left \$29,208.53. When the board of equalization met it was discovered that the bank's last statement on March 28, 1904, showed the following as to real estate:

Banking house, furniture and fixtures....	\$1,000.00
Other real estate and mortgages owned..	10,934.12

Total\$11,934.12

The board thereupon directed the clerk to notify the bank to appear, which he did, and the bank appeared by its

* Rehearing allowed. See opinion, p. 815, *post*.

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attorney and cashier. And the board, over the objections of the bank, changed the list as returned by deducting the amount of real estate shown in the last statement from the total valuation of the shares of stock, surplus and undivided profits, instead of the amount returned to the assessor. The bank thereupon prosecuted its appeal from the action of the board in reducing the valuation of the real estate deducted from the valuation of its capital stock. This issue, and this issue alone, was presented by the appeal.

At the hearing of the cause on appeal, the only evidence offered was the bank's statement of March 28, 1904, the list returned by the assessor, the testimony of Mr. Gund, cashier of the bank, and a description of the real estate returned for assessment and claimed as assets of the bank. Mr. Gund testified that all the tracts of land claimed were owned by the bank, but that, because the bank was carrying too much real estate in its capital stock, it had been requested by the national bank examiner to reduce the amount of real estate; that it had accordingly deeded some of the tracts of land in trust to the officers of the bank; that they in turn had given mortgages, accommodation notes and overdrafts thereon to the bank; and that in this form all of the real estate in dispute had been included in the capital stock of the bank. This testimony was not disputed. There was no issue raised on the valuation of the capital stock, nor was any effort made by the board to increase its valuation as returned by the assessor. In the case of *Nebraska Telephone Co. v. Hall County*, 75 Neb. 405, an appeal arising under section 1032a Ann. St., we held that the language of the section "clearly limits the inquiry in the district court to the questions raised before the board of equalization." This was the view evidently taken by the learned trial judge, who at the close of the testimony entered judgment in favor of the bank, and set aside the action of the board of equalization in changing the amount of the deduction made from the list returned on account of real estate otherwise as

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essed, and directed the assessment to be made in conformity with the list as returned. To reverse this judgment the county has appealed to this court.

Aside from the one issue indicated, the other questions contended for in the brief of the county were not raised before the board of equalization. Consequently, in view of the undisputed testimony in the record, we are convinced that the judgment of the district court on the issue presented was right and should be affirmed, which we accordingly recommend.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed July 12, 1907. *Former judgment of affirmance vacated and judgment of district court reversed:*

1. **Taxation: ASSESSMENT: APPEAL.** The assessment of property for the purpose of taxation as ultimately fixed by the board of equalization is final, except upon appeal to the district court, and should not be disturbed on such appeal unless it appears from clear and convincing proof that it is erroneous.
2. ———: **ASSESSMENT OF BANK STOCK.** An assessor is required to assess the stock of a bank at its real value, and, where a bank owns real estate of a greater value than that at which it is carried on the bank books, such excess of value should be taken into consideration in fixing the value of the stock.
3. ———: ———. National banks are the agents of their stockholders for the purpose of listing their stock in such banks for taxation and paying the tax thereon.

JACKSON, C.

The plaintiff scheduled its property as of April 1, 1904, for the purpose of taxation, as follows:

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Capital stock.....	\$50,000.00
Surplus	10,000.00
Undivided profits.....	4,968.53
Total	\$64,968.53
Real estate.....	\$34,380
Personal property.....	1,380
Total.....	\$35,760

Assessable value of shares at 20 per cent. of balance, \$5,941

This statement was adopted by the assessor as the basis of the valuation of the shares of stock of the bank. On April 2 of that year the plaintiff made a report to the comptroller of the currency of the affairs of the bank at the close of business on March 28. This report included the items of the banking house, furniture and fixtures \$1,000; other real estate and mortgages owned, \$10,934.12; capital stock paid in, \$50,000; surplus fund, \$10,000; undivided profits, less expenses and taxes paid, \$5,421.50. The county board of the defendant, while sitting as a board of equalization, having before it the bank's report to the comptroller of the currency and the return of the assessor, notified the bank to appear and show cause why the assessed valuation of its stock should not be increased. The bank appeared by its cashier and attorney and filed written objections to any increase in such valuation. The objections included a showing of the ownership of real estate of the value of \$36,140. As a result of this proceeding the board added \$23,445.88 to the assessed valuation of the stock of the bank, and thus increased its ultimate valuation for the purpose of taxation to \$10,530.88. The bank appealed to the district court, where the action of the board was vacated, and the county brings the case to this court for review.

At the hearing in the district court the evidence related chiefly to the procedure before the board of equalization although it was disclosed by the evidence of the cashier of the plaintiff that the bank was the beneficial owner of

several quarter sections of land, the title having been taken in the name of certain officers of the bank; that it was thus taken to prevent the real estate from appearing too bulky in their public statements. This real estate was represented on the books of the bank by a \$2,000 real estate mortgage, an overdraft of \$1,089.30, the cashier's note for \$1,800, the note of the German National Bank for \$2,600, and the real estate item of \$10,934.12, which doubtless included the \$2,000 mortgage, or a total of \$16,423.42. The assessed valuation of the real estate claimed by the bank, after the process of equalization by the county board, was fixed at \$31,805. Under this condition of the record the judgment of the district court was sustained in an opinion *ante*, p. 813. A rehearing has been allowed, and the case is before us for the second time.

It was stated in the former opinion that Mr. Gund (cashier) testified that all the tracts of land claimed were owned by the bank, but, because the bank was carrying too much real estate in its capital stock, it had been requested by the national bank examiner to reduce the real estate, and it had accordingly deeded some of the tracts of land in trust to the officers of the bank; that they in turn had given mortgages, accommodation notes and overdrafts thereon to the bank, and that in this form all of the real estate in dispute had been included in the capital stock of the bank. This statement is not complete. The items appearing on the books representing real estate amounted, as we have already shown, to but \$16,423.42, while the value of the real estate as it was represented to be by the bank in its protest before the board of equalization was \$36,140.

It is provided by our revenue law: "The president, cashier or other accounting officer of every bank or banking association, loan and trust or investment company, shall on the first day of April of each year make out a statement under oath, showing the number of shares comprising the

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actual capital stock of such association, bank, or company, the name and residence of each stockholder, the number of shares owned by each and the value of said shares on the first day of April, and shall deliver such statement to the proper deputy assessor. Such capital stock shall thereupon be listed and assessed by him, and return made in all respects the same as similar property belonging to other corporations and individuals. Whenever any such bank, association or company shall have acquired real estate or other tangible property which is assessed separately, the assessed value of such real estate or tangible property shall be deducted from the valuation of the capital stock of such association or company. The assessor shall determine and settle the true value of each share of stock after an examination of such statement, and in case of a national bank an examination of the last report called for by the comptroller of the currency; if a state bank, the last report called for by the state banking board; and if the assessor deem it necessary, an examination of the officers of such bank, association or company, under oath, in determining and fixing the true value of such stock, and shall take into consideration the market value of such stock, if any, and the surplus and undivided profits. Such association, bank or company shall pay the taxes assessed upon its stock and shall have a lien thereon for the same." Comp. St. 1903, ch. 77, art. I, sec. 56. It will thus be seen that it is the province of the assessor to determine and settle the true value of the stock of a bank. For that purpose he should appraise each asset of the bank at its real value. The value thus ascertained becomes a charge against the item of value of stock and should be credited with the debts of the bank. The remainder is to be taken as the true value. From the true value of the stock the assessed valuation of the real estate and of such of the personal property as is locally assessed should be deducted, and the remainder is the amount to be apportioned among the shareholders, according to their holdings, as the value of their stock for the purpose of taxation.

One item of value is real estate, if any there be belonging to the bank, and if it appears to the assessor that the bank owns real estate of a value in excess of that at which it is carried on the books, it is clearly his duty to take such excess of value into consideration in determining the actual value of the stock. It appears from the record, on the showing made by the bank itself, that it owned real estate of the value of more than \$19,000 in excess of its book value. That fact the assessor should have considered in valuing the capital stock, and, having failed to do so, the county board, when sitting as a board of equalization, not only had the right to consider this excess of value, but it was their duty to do so, and the district court should not have disregarded this important item in the disposition of the case. Furthermore, the valuation of the stock of the bank was reduced by the assessor to the extent of \$34,380, assessed valuation of the real estate, whereas the assessed valuation of the real estate as ultimately fixed by the board of equalization was \$31,805. The latter sum is the one that should have been deducted from the total valuation of the stock instead of the sum actually deducted.

The assessed valuation of the stock of the shareholders as ultimately fixed by the board of equalization becomes final, except upon appeal to the district court, under the provisions of the statute, and, where an appeal is taken, the assessment made by the board of equalization should not be disturbed, except upon clear and convincing proof that it is erroneous. The evidence taken at the trial in the district court was insufficient upon which to base a judgment setting aside the assessment as ultimately fixed by the board of equalization. No proof was offered of the value of the assets of the bank other than the real estate, and none whatever of the indebtedness.

The appellee insists that the entire proceeding is void, because the tax, in case of national banks, is a liability of the shareholder, and not of the banking corporation itself, and because the shareholders were not personally noti-

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fied of the proceedings before the board; but that is an erroneous interpretation of the federal statute. Shares of stock in a national bank are assessed to the individual stockholder at the place where the bank is located, but the bank is liable in the first instance for the payment of the tax, and is given a lien on the stock to secure repayment from the shareholder. The bank is made the agent of the shareholder, not only for the payment of the tax, but for the purpose of listing the stock for taxation. No other course would be practical, because in many cases as in this, stockholders in national banks reside in different states and all are not accessible to local assessors. Our statute was enacted with reference to these conditions and is in entire harmony with the federal law.

With reference to the procedure before the county board of equalization, such board is authorized by statute when they have reason to believe that any person or corporation has not been fairly assessed, to call before it such person, agent or officer of the corporation, under oath to give such information as they may possess touching the valuation of the property sought to be listed and assessed. It is also provided that appeals may be taken from the action of the county board of equalization to the district court, where the appeal should be heard as in equity, without a jury, and the court is required to determine anew all questions raised before the board which relate to the liability of property to assessment. No formal written notice was given in this instance, but the bank appeared by its proper officer and an attorney, and the board was not without jurisdiction. In this procedure the board sought the same source of information which the assessor was required to seek. It was not necessary to notify or bring before the board each individual shareholder.

It is recommended that our former judgment be vacated the judgment of the district court reversed and the cause remanded.

AMES and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is vacated, the judgment of the district court is reversed and the cause remanded.

REVERSED.

JOHN C. TROUTON, ADMINISTRATOR, APPELLANT, v. NEW
OMAHA THOMSON-HOUSTON ELECTRIC LIGHT COM-
PANY, APPELLEE.

FILED DECEMBER 21, 1906. No. 14,543.

Petition examined, and held obnoxious to a general demurrer under the former decision of this court in *New Omaha T.-H. E. L. Co. v. Anderson*, 73 Neb. 84, which is herein followed and approved.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

F. T. Ransom and Gurley & Woodrough, for appellant.

W. W. Morsman, contra.

OLDHAM, C.

This is an action by the administrator of the estate of James Adams, deceased, for the benefit of the next of kin, in which the plaintiff seeks a recovery against the defendant because of its alleged negligent acts in connection with the management of its electric wires, by means of which a bolt of electricity is charged to have passed down a ladder, which was being removed from between the wires by the deceased and three other members of the fire department of the city of Omaha, and which occasioned the death of each of the firemen so engaged. Two cases involving this same injury have been before this court, and every question then at issue was examined and finally determined in the opinion delivered in *New Omaha T.-H.*

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E. L. Co. v. Anderson, 73 Neb. 84. As every question then involved in the controversy is set forth and discussed in that opinion, we need only consider such new allegations in the present petition as seek to charge acts of negligence not considered in that opinion. During the pendency of the appellate proceedings in the two cases before mentioned, the case now at bar remained undisposed of on the docket of the district court for Douglas county, and after the opinions in the other two cases were delivered by this court plaintiff filed an amended petition, to which a demurrer was interposed. This demurrer was sustained by the trial court. Plaintiff then asked leave to file a second amended petition, which was not verified, and, this leave being denied, the court dismissed the amended petition. To reverse this judgment of dismissal plaintiff has appealed to this court.

As there was no showing of any abuse of discretion in the refusal of the trial court to permit the filing of the second amended petition, and as on such refusal plaintiff appears to have elected to stand on his first amended petition, we will review the judgment of the trial court in sustaining defendant's demurrer and dismissing this petition. In our opinion in *New Omaha T.-H. E. L. Co. v. Anderson*, *supra*, we held, in substance, that the members of the fire company, while engaged in ascending and descending their ladder and in entering buildings for the purpose of extinguishing fires, were not trespassers but mere licensees, who must, so far as the liability of the defendant company is concerned, at their own risk enter the premises in the condition in which they found them and that, while so engaged, the defendant company was liable only for injuries intentionally or wantonly inflicted by it. We also held that, under the provisions of the ordinance of the city of Omaha pleaded in the petition the chief of the fire department and the city electrician had sole charge of the matter of cutting and removing the wires of the defendant company during the time of the fire, and that the lineman, who was furnished by the

company to attend at places of fire, acted, while performing such duty, under the sole charge of the fire chief and the city electrician, and not as the agent of the defendant. In the amended petition in the case at bar plaintiff, after alleging the death of his intestate from a bolt of electricity hurled down the fire ladder while it was being removed from between the wires of the defendant company, set up, in substance, the ordinance of the city of Omaha, which was reviewed in our former opinion, and alleged that the defendant company sent a lineman to the fire in conformity with the provisions of this ordinance, and that it was the duty of the chief of the fire department and the city electrician to cut the wires, when it was necessary for the safety of those engaged in extinguishing fires, and alleged that they (the officers and lineman) neglected to perform this duty. If the petition had gone no further, it would plainly have failed to state a cause of action against the defendant, under our former opinion; but it proceeds to charge that the defendant, for the purpose of protecting its property and restoring and repairing the wires that might be cut at the time of the fire, sent another employee, named Brinkman, to repair and restore wires and prevent its property from being unnecessarily destroyed, and "to speak and act for the defendant," and that this latter employee was present when the firemen attempted to lower the ladder, and that he knew of the danger to the firemen by reason of currents of electricity, which were, or might be, conducted by said wires, and that said wires might momentarily become charged with currents of electricity, and that, with such knowledge, Brinkman negligently and carelessly neglected to warn the firemen of the danger, but, on the contrary, carelessly, wantonly and negligently invited the firemen to proceed to lower the ladder by calling out to them: "All right, boys. Go ahead. Those wires are dead."

It is determined in the decision already rendered, with reference to this accident, that defendant light company owed no duty to the firemen to warn them of danger either

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in ascending or descending the ladder or in removing it from between the wires after the fire was extinguished. This was a duty, if such duty existed, which, under the ordinance pleaded in the amended petition and under our former opinion, devolved upon the officers of the city. While the amended petition charges that Brinkman knew, or might have known, that the wires were, or might be charged with dangerous currents of electricity, yet the petition simply shows a remark made by Brinkman, which amounted to an expression of his opinion that the wires were dead. Now, according to the allegations of the amended petition, Brinkman was not sent to cooperate with the officers of the fire company, but only to care for the property of the defendant, which might be injured at the fire, and there is nothing in the scope of the agency pleaded which would bind the company for an opinion he might express in the presence of the firemen as to whether the wires were dead or alive.

We are therefore of opinion that the judgment of the trial court in sustaining defendant's demurrer and dismissing plaintiff's petition was right, and we recommend that it be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAY C. SMITH ET AL.
APPELLANTS.

FILED DECEMBER 21, 1906. No. 14,557.

1. Appeal: CHANGE OF VENUE. To warrant this court in overruling the action of a trial judge denying an application for a change of venue on the grounds of bias and prejudice of the trial judge against a litigant, the evidence offered in support of the fact of

such prejudice must be clear and convincing, and strong enough to overthrow the presumption of the impartiality of the court.

2. **Harmless Error.** Action of the trial court in the admission of evidence examined, and *held* not prejudicial.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Billingsley & Greene, for appellants.

James L. Caldwell, F. M. Tyrrell and C. E. Matson,
contra.

OLDHAM, C.

This was an action instituted by the state of Nebraska to recover the obligation in a recognizance entered into by the defendants for the purpose of securing the appearance of Ray C. Smith at a term, therein named, of the district court for Lancaster county, the said Smith being charged, by proper information in said court, with the crime of bigamy. On a trial of the issues to the court and jury, a verdict was directed for the plaintiff, and judgment rendered on the verdict. To reverse this judgment defendants have appealed to this court.

The first alleged error called to our attention in the brief of the appellants is as to the action of the trial judge in proceeding with the hearing of the cause after defendants had filed an application for a change of venue, supported by the following affidavit: "Robert J. Greene, being first duly sworn, upon oath says that the defendants cannot safely proceed to trial in the above entitled cause before Hon. A. J. Cornish, Judge, or Hon. Lincoln Frost, Judge, because of the interest, bias and prejudice of said judges, and each of them, against this affiant. (Signed) Robert J. Greene." No other testimony than this affidavit was filed or offered in support of the application, which merely alleges in the general terms of the affidavit the prejudice of each of these judges against defendant Greene, without attempting to specify any connection that

either of the judges had with the question at issue that would tend to show any interest in the result of the trial or any relationship, direct or remote, toward any one connected with the litigation. At common law the right to a change of venue because of prejudice of the trial judge did not exist. But a different rule with reference to such right now obtains in nearly all of the states of this Union. The rule, however, has its origin either in provisions in the constitutions or in statutory enactments of the various states. These provisions have been generally liberally construed in furtherance of the policy of granting to every litigant the right to a fair and impartial trial. And to this end it is generally held that, where a specific constitutional or statutory disqualification of a trial judge is alleged in the form prescribed by statute, the litigant is entitled as a matter of right to the change prayed for.

A specific disqualification for prejudice of a trial judge of a district court is not enumerated in any of our statutes, either civil or criminal, which apply to changes of venue. Section 37, ch. 19, Comp. St. 1905, provides that a judge is disqualified in any case wherein he is a party, or is interested, or is related to either party, or has been attorney for either party. Section 26 of the same chapter provides for interchanging judges where, on account of sickness, interest, absence from the district, "or from any other cause," a judge is unable to act. By section 61 of the code a change of venue is provided for when a fair and impartial trial cannot be had, or when the judge is interested, has been of counsel in the case, is related to either of the parties, "or is otherwise disqualified to sit." These various sections of the statute were examined by this court in the case of *Le Hane v. State*, 48 Neb. 105, and it was there held that, while the bias and prejudice of the trial judge was not specifically provided for in the statute as ground for a change of venue, yet an application for a change of venue on this ground, when made in the interest of a fair trial and supported by sufficient evidence, might be maintained. In the absence of an ex-

press statute providing for a change of venue for prejudice of the judge, and prescribing the means by which the fact of such prejudice may be established, it is generally held that a clear showing must be made of the cause of the disqualification to warrant a reviewing court in setting aside the order of the trial judge overruling such application.

We are cited by appellants to the holding in *Peyton's Appeal*, 12 Kan. 398, in which, in a disbarment proceeding before a district judge, the ruling of the court on a motion for a change of venue because of the prejudice of the judge was reversed by the supreme court of the state of Kansas, in an opinion by Judge Valentine. In this case, however, it was said: "The evidence introduced on the hearing of the alternative motion, for a change of venue or for the election of a judge *pro tem.*, was amply sufficient to show that the judge of the court below was prejudiced against the applicant." In the later case of *City of Emporia v. Volner*, 12 Kan. 622, where an application for a change of venue because of prejudice of the judge was supported alone by the affidavit of the applicant, the supreme court refused to reverse the action of the trial court in overruling the motion, and Brewer, J., in rendering the opinion, said: "It seems to us therefore that this is the true rule: that such facts and circumstances must be proved by affidavits, or other extrinsic testimony, as *clearly* show that there exists a prejudice on the part of the judge toward the defendant, and unless this prejudice thus *clearly* appears, a reviewing court will sustain an overruling of the application, on the ground that the judge must have been personally conscious of the falsity or non-existence of the grounds alleged. It is not sufficient that a *prima facie* case only be shown, such a case as would require the sustaining of a challenge to a juror. It must be strong enough to overthrow the presumption in favor of the trial-judge's integrity, and of the clearness of his perceptions." While there are cases which hold that, in the absence of a

specific statute awarding a change of venue for prejudice of the judge, the action of the trial court on such an application is not subject to review, yet the reasoning in the case of *Le Hane v. State*, *supra*, seems to commit us to the doctrine announced in *City of Emporia v. Volmer*, *supra*; and, as this doctrine is supported by the current of modern authority, we see no good reason for departing from it. The application of the principle herein announced to the showing made in the record in the case at bar requires us to decline to interfere with the action of the trial court in overruling the defendant's application.

The next alleged error called to our attention is as to the action of the trial judge in overruling defendants' motion for a continuance in the case. An examination of the showing made for a continuance convinces us that it was insufficient and the trial judge did not abuse his discretion in overruling the same.

The action of the trial court in the admission of evidence is also alleged against in the brief of the appellants, but, from an examination of the record, the only conclusion that could have been reached from the pleadings and all the testimony admitted was that directed by the trial judge in his charge to the jury. While, in our view, some incompetent evidence was admitted, yet it was nothing that went to the prejudice of defendants' rights, and no evidence was excluded which tended to support any defense to the cause. It was clearly and indisputably established that the defendants entered into the recognizance alleged upon, which was given for the purpose of procuring the attendance of Ray C. Smith at the ensuing term of court to answer to the charge of bigamy, which had been preferred against him by information of the county attorney; and that Ray C. Smith had absconded from the state of Nebraska, and failed and neglected to appear at the term of court at which he was recognized; and that a proper default had been entered upon the bond. In this state of the record, but one conclusion could be reached, and that was that the conditions of the bond had been

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forfeited, and the promise to pay of the sureties had become absolute.

We therefore recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHARLES MANAHAN ET AL., APPELLEES, V. ADAMS COUNTY ET AL., APPELLEES; KOUNTZE BROTHERS, INTERVENERS, APPELLANTS.*

FILED DECEMBER 21, 1906. No. 14,572.

1. **School Districts: INDEBTEDNESS.** Prior to the passage of the act of February 26, 1879 (laws 1879, p. 170), providing for the issuing and payment of school district bonds, territory detached from a school district, which was subject to an indebtedness, might be held equitably liable to such district for its proportionate share of the indebtedness.
2. ———: **ENFORCEMENT OF LIABILITIES.** But such liability could not be enforced at the suit of the judgment creditor, except on allegation and proof of the fact that there was not enough property remaining in the district originally liable to pay the existing indebtedness.
3. **Intervening petition examined, and held not sufficient to state a cause of action.**

APPEAL from the district court for Adams county: ED L. ADAMS, JUDGE. *Affirmed.*

Reavis & Reavis and J. P. A. Black, for appellants.

Tibbets, Morcy & Fuller and F. P. Olmstead, contra.

*Rehearing denied. See opinion, p. 832, *post*.

OLDHAM, C.

In 1873 school district No. 34 of Adams county, Nebraska, for the purpose of raising money to erect a school house, executed its two written notes or bonds for \$500 each. These obligations were purchased by Kountze Brothers. The district as then constituted included within its boundaries certain sections of land, which by subsequent change and readjustment of county boundaries now lies in Hall county, Nebraska, and is there known as school district No. 21 of Hall county. The fact of this particular change, however, is immaterial to any question involved in the present controversy. In addition to the territory subsequently transferred to Hall county there were other sections of land included in the boundaries of district No. 34, which in the year 1874, and after the bonds had been issued and negotiated, appear to have been legally detached from district No. 34 and organized, with other contiguous territory, into school district No. 52 of Adams county. In 1878 Kountze Brothers procured a judgment against district No. 34 for the principal and interest then due on their bonds. Since the rendition of this judgment there has been much litigation over its attempted collection between the judgment creditors and portions of the territory formerly constituting district No. 34. Nothing determined in these numerous controversies bears directly on the questions now at issue, except the decision in *School District No. 34 v. Kountze Bros.*, 3 Neb. (Unol.) 691, which affirmed a judgment of revivor of the judgment entered in favor of Kountze Brothers in 1878. After the judgment of revivor was entered a levy of a tax of 1.50 mills for the payment of the revived judgment was spread upon the tax books of Adams county, and extended over the property now embraced within the limits of district No. 34, and also over the detached property in Adams county formerly belonging to it, but separated from it before the judgment was rendered against this district. A number of owners of real estate in the detached territory joined

in a petition to enjoin the levy and collection of the 150-mill tax against the property situated in this territory. The petition was filed for the benefit of plaintiffs and all others similarly situated, and prayed for a perpetual injunction against the levy of the 150-mill tax on the property situated in the detached territory. To this suit Adams county and the treasurer of Adams county were made parties defendant, and each appeared and filed an answer. School district No. 34, as now constituted, was permitted to intervene, as were also Kountze Brothers, who filed a petition as judgment creditors of the district. At the hearing of the cause in the district court the injunction was made perpetual against the levy and collection of the 150-mill tax as prayed for in the petition. Neither county, the county treasurer, nor district No. 34 has appealed from this judgment, but an appeal has been taken by Kountze Brothers, interveners, as judgment creditors of district No. 34.

Prior to the passage of the act of February 26, 1879 (laws 1879, p. 170), providing "for the issuing and payment of school district bonds," there was no defined statutory liability upon detached territory of school districts for the indebtedness incurred during the time such territory was in the district. But in the unreported case of *People v. School District No. 9*, referred to in *State v. School District No. 9*, 8 Neb. 92, and in the case of *Clother v. Maher*, 15 Neb. 1, the equitable principle was recognized that, where a district which was in debt was subdivided and sufficient territory detached to impair the obligation by not leaving sufficient property liable for the payment thereof, the detached territory would be held liable for its share of such indebtedness. In *State v. School District No. 9*, *supra*, an application for a mandamus to extend the levy over the detached territory for an indebtedness accruing while such territory was included within the boundaries of the district was denied for the reason, as stated in the opinion, that the primary liability for the debt was against the district, and that it

was not made to appear that the amount of property remaining was inadequate for the payment of the debt and interest.

In the case at bar the intervening judgment creditors nowhere allege that the property remaining in district No. 34 is inadequate even under the levy made for the satisfaction of their judgment, nor did they introduce any proof at the trial of the cause to support such an averment. In this view of the case we think the petition insufficient to show a right of intervention, or that the rights of the interveners could in any manner have been affected by the judgment of the district court. The equitable right to contribution as between district No. 34 and its detached territory for the payment of the debt created is not before us in this controversy, and, consequently, we express no opinion upon it. As none of the other parties have appealed, we recommend that the judgment of the district court dismissing appellant's petition of intervention be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed April 15 1907. *Rehearing denied:*

AMES, C.

The brief continues to urge the point made in the original brief and urged at the oral argument that the act of 1879 (laws 1879, p. 170) applied to the contract under which the original indebtedness was created. As the indebtedness against the school district was created long before the passage of this act, we were of opinion that this act could not be given a retroactive interpretation, and therefore, we determined the case on the laws in existence at the time the contract was entered into. The opin-

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ion cited Nebraska decisions governing the liability of detached territory for the indebtedness of the school district from which it was detached at the time the indebtedness accrued. Appellants' contention depends on the application of the provisions of this act of 1879 to a contract entered into by a school district in 1873, from which territory was detached in 1874, or five years before the passage of the act. Our view was that the act of 1879 could not entail a different liability on territory detached before its passage than such as existed at the time it was detached. In other words, we thought that territory detached from a school district in 1874 carried with it the burden of liability for the indebtedness of the school district that was entailed by the law then in existence, and that this burden could not be increased by subsequent legislative enactment.

We are satisfied with our former conclusion, and recommend that the motion be overruled.

By the Court:

MOTION OVERRULED.

ARTHUR P. GUIOU ET AL., APPELLEES, V. DANIEL W. RYCKMAN ET AL., APPELLEES; MARY A. WALLACE, APPELLANT.

FILED DECEMBER 21, 1906. No. 14,581.

1. **Mechanics' Liens: LIABILITY OF VENDOR.** Where a vendor and vendee cooperate in plans for the erection of improvements upon real estate covered by their agreement, the interest of the vendor, as well as that of the vendee, is bound for the payment of liens for labor and material which have been furnished for such improvements.
2. ———: **STATEMENT OF ACCOUNT.** Where a contract is entered into for a specific sum for labor or material, and is complete within itself, and is filed with the statement of the lien, a more detailed statement of the account is unnecessary.

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3. ———: DESCRIPTION OF PROPERTY. In an affidavit for a mechanic's lien, if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient. *White Lake Lumber Co., v. Russell*, 22 Neb. 126, followed and approved.
4. Evidence examined, and held sufficient to sustain the decree of the district court as to the liens filed herein.
5. Evidence examined, and held insufficient to show defendant Daniel W. Ryckman entitled to affirmative relief.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Decree modified.*

E. H. Westerfield, for appellant.

*Francis A. Brogan, D. W. Merrow, Nelson C. Pratt,
Byron G. Burbank, E. C. Hodder and Baldrige & De Bord.*
contra.

OLDHAM, C.

This action was instituted by the plaintiffs in the court below for the purpose of foreclosing mechanics' and material men's liens upon two lots situated in the city of Omaha, Nebraska. The record title to these lots was in defendant Mary A. Wallace, and Daniel W. Ryckman was in possession of the lots in controversy under an executory contract for the purchase thereof. A number of defendants were joined as holders of mechanics' and material men's liens, and they each filed answers and cross-petitions. Defendant Mary A. Wallace filed an answer, denying the validity of these various liens, and by way of cross-petition alleged that she was the owner of the lots in dispute, and that certain of the liens filed by plaintiffs and cross-petitioners were a cloud upon her title, which she asked to have canceled and removed from the record. Defendant Daniel W. Ryckman appeared, but does not seem to have asked for any affirmative relief in his answer. On issues thus joined there was a trial to the court, and judgment in favor of the plaintiffs and cross-petitioners.

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in which the claims for work done and material furnished for the buildings on the lots by the plaintiffs and cross-petitioners were decreed to be a first lien on the premises, and the claim of defendant Mary A. Wallace for the purchase price of the premises under her contract with defendant Ryckman was decreed to be a second lien, and an order of sale was directed under this decree, which provided that, after the payment of the mechanics' and material men's liens and the payment of the amount due on the purchase price to defendant Mary A. Wallace, the remainder, if any, should be paid to defendant Daniel W. Ryckman. To reverse this judgment defendant Mary A. Wallace appeals to this court.

The facts underlying this controversy are that at and prior to the 28th day of July, 1904, the defendant Mary A. Wallace was the owner of the lots in dispute, which were described as lots 1 and 3, in Wallace's subdivision of Omaha, Nebraska. Prior to the day last mentioned defendant Ryckman negotiated through G. G. Wallace, a real estate agent in Omaha and son of the defendant Mary A. Wallace, for the purchase of the lots. As a result of these negotiations defendant Mary A. Wallace, who was not a resident of Omaha, came to Omaha, and entered into the following written agreement with defendant Ryckman: "It is hereby agreed, by and between the parties hereto that Mary A. Wallace, party of the first part, will convey by a good and sufficient warranty deed, with perfect title, all taxes due and payable at this date to be paid, lots 1 and 3, Wallace's subdivision, City of Omaha, Douglas county, Nebraska, to D. W. Ryckman, party of the second part, on completion, by said party of the second part, of a house of not less than five rooms, on each of said lots. Said houses to be constructed in a good and workmanlike manner, and to be completed on or before November 1, 1904. The consideration for said lots to be \$700 to be paid on or before November 1, 1904, or on completion of said houses. The party of the first part further agrees that should the party of the second part not be

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able to secure a loan sufficient to erect said houses, she will take a second mortgage on both houses and lots, not to exceed \$200, payable \$5 a month, with interest at 7 per cent., payable monthly from this date. The total indebtedness not to exceed \$1,700, and all labor and material to be paid by the party of the second part. Permission is given to begin erection of said houses any time within 30 days. Signed this 28th day of July, 1904. M. A. Wallace, D. W. Ryckman. (Witness) G. G. Wallace." After the signing of this contract Mrs. Wallace left the city, and did not return before the present suit was instituted. Defendant Ryckman entered upon the premises in the month of October, and began the erection of a building on lot 1. It is to the claims for material furnished and labor performed on the building erected on this lot that our attention will be directed, since it is stated in appellant's brief, and conceded by counsel for the appellees, that the claims which were decreed liens on lot 3 have all been settled by the parties.

The first objection urged against the decree by the appellant is as to so much of it as grants affirmative relief to defendant Daniel W. Ryckman, by directing the payment to him of the surplus, if any, arising from the sale of the premises, after the liens have been satisfied. It is urged in support of this objection that defendant Ryckman did not ask for any affirmative relief from the court, and that there is no evidence in the record that shows that he did anything under the contract, except to take possession of the lot in controversy and proceed with the erection of the building, without paying or offering to pay for any of the labor performed or material furnished thereon, or paying or offering to pay any part of the purchase price agreed upon in the contract. The transcript of the pleadings and the bill of exceptions, containing the testimony introduced at the trial of the cause, fully sustain this contention. While the evidence shows that Ryckman moved into the house on lot 1 after it was partially completed, and was residing there at the time of the trial in the court

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below, yet neither in his pleadings nor in his testimony taken at the trial did he claim any right to affirmative relief, but on the contrary his evidence was more in the nature of a disclaimer, for he says that he did not know that he had any interest in the contract for the property.

It is next urged that the title of the appellant Mary A. Wallace in the premises is not liable for the liens of either plaintiffs or cross-petitioners for material furnished to defendant Ryckman and labor performed at his instance in the erection of the building. This contention rests on the theory that the agreement before set out between Mrs. Wallace and Mr. Ryckman was not a contract binding on either party thereto, but was only an option agreement, and that the lienors were bound at their peril to know the terms of the agreement under which the contractor was operating. While the contract by its terms gives defendant Ryckman the right to enter upon the premises, which were at that time vacant lots, within 30 days and proceed with the construction of the buildings contemplated in the contract, time was nowhere made of the essence of the contract by its terms. And the evidence shows that G. G. Wallace, son and agent of the appellant, knew of the fact of the construction of the buildings and the purchase of material therefor at the time they were furnished Ryckman in the month of October, 1904. The contract was plainly entered into by the parties for the purpose of having buildings erected on the lots, and this places it within the line of decisions of this court that hold that, where the vendor and vendee cooperate together in plans for the erection of improvements upon real estate covered by their agreement, the interest of the vendor, as well as that of the vendee, is bound for the payment of liens for labor and material which have been furnished for such improvements. *Bohn Mfg. Co., v. Kountze*, 30 Neb. 719; *Millsap v. Ball*, 30 Neb. 728; *Pickens v. Plattsmouth Investment Co.*, 37 Neb. 272; *Cummings v. Emslie*, 49 Neb. 485.

Objections are urged to the sufficiency of the proof of

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the filing of certain of the liens on which judgments were rendered in the court below. One of these objected to is the lien of defendant and cross-petitioner George W. Jones. The evidence with reference to the filing of this lien is as follows: "Q. I hand you a mechanic's lien, and ask you if that is your signature attached to it, and you caused it to be filed in the register of deeds' office? A. Yes, sir. By Mr. Burbank: This may be marked 'Exhibit 9,' and I will offer it in evidence together with the indorsements thereon." The indorsements showed the filing mark of the register of deeds, and the date of filing and place of registry. This was clearly sufficient.

Similar objections are interposed to the sufficiency of the proof of filing of the liens of cross-petitioners S. F. Davis, Carl Smith, C. A. Kauffold, and J. B. Benjamin. Each of these lienors testified that they had paid the filing fee to the register of deeds, and that the liens bore their respective signatures, but the offer of the indorsements on the liens was not specifically tendered. While there was a technical inaccuracy in the proof of the registry of these liens, yet it was aided by the allegations of the answer and cross-petition of the appellant, who alleged in her cross-petition that these liens had been filed with the register of deeds of Douglas county, Nebraska, and that they constituted a cloud upon her title, which she asked to have removed by affirmative decree of the court.

Objection is urged to the sufficiency of the lien filed by cross-petitioner J. W. Robbins, in that it does not contain a sufficient description of the property which it seeks to charge, nor an itemized statement of the material furnished. The lien alleges an amount due on a contract which is attached to and made a part of the affidavit. Where a contract is entered into for a specific sum for labor or material, and is complete within itself, and it is filed with the statement of the lien, a more detailed statement of the account is unnecessary. *Doolittle & Gordon v. Plenz*, 16 Neb. 153. The description of the lots contained in the lien is: "The southeast corner and third lot from

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corner on the south, being lots 1 & 3 in Wallace's Sub., Mary A. Wallace being the owner." As there are no rights of third parties, who have purchased relying on the record, involved in this controversy, a liberal rule as to the sufficiency of description in the affidavit for a mechanic's lien should be applied, and, "if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient." *White Lake Lumber Co. v. Russell*, 22 Neb. 126. The description may also be aided by any extrinsic evidence furnished by the instrument which is filed as such notice of the lien. *Drexel v. Richards*, 50 Neb. 509. The notice filed bears the date, "Omaha, Neb., Dec. 1, 1904," and the venue of the affidavit is laid in Douglas county, Nebraska. We think that, thus aided, the description is sufficient.

We therefore recommend that so much of the judgment and decree of the district court as provides that the surplus, if any, arising from the sale of lot 1, be paid to defendant Ryckman be set aside, and that a judgment and decree be entered directing the payment of such surplus, if any, to defendant Mary A. Wallace, and that the judgment and decree so modified be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that so much of the judgment and decree of the district court as provides that the surplus, if any, arising from the sale of lot 1, after the payment of the liens thereon, be paid to defendant Ryckman be set aside, and that defendant Mary A. Wallace is the owner in fee of the lot in question, and that the surplus, if any, be paid to defendant Mary A. Wallace, and that the judgment and decree of the district court so modified be affirmed.

DECREE MODIFIED.

**CORA ALLEN, APPELLER, V. ARTHUR H. RUSHFORTH,
APPELLANT.**

FILED DECEMBER 21, 1906. No. 14,631.

1. **Sales.** The former opinion in this case, 72 Neb. 907, examined and adhered to.
2. **Trial: REFUSAL TO INSTRUCT.** In the trial of an action at law, it is reversible error to refuse to submit to the jury a legal defense properly pleaded and supported by competent evidence.
3. **Sales: DAMAGES.** Where the vendee, under a contract of purchase, refuses to receive the goods contracted for, the measure of the vendor's damage is the difference between the contract price of the goods and their reasonable market value at the time and place of delivery.

APPEAL from the district court for Douglas county.
WILLIAM A. REDICK, JUDGE. *Reversed.*

P. A. Wells and Fawcett & Abbott, for appellant.

Weaver & Giller, contra.

OLDHAM, C.

This cause is here a second time for review by this court. Our former opinion, in which the issues are fully stated, is reported in 72 Neb. 907. In this opinion it was held that, under the pleadings and proof, an action for the contract price of the hay was properly brought, and that the case should have been submitted to a jury. On a retrial of the cause in the district court in conformity with this opinion, the case was submitted to a jury and a verdict was returned in favor of the plaintiff for the contract price of the hay in dispute. To reverse the judgment on this verdict defendant has appealed to this court.

We are fully satisfied with the conclusion reached in our former opinion and adhere to it, not only as the law of the case, but also as a correct solution of the questions involved, so far as plaintiff's right to recover is concerned.

At the last trial of the cause defendant introduced testimony tending to show that he refused to take all the hay cut from the tract in dispute, because plaintiff insisted that the hay should be weighed on her scales and paid for according to such weights; that after he had baled part of the hay, and hauled six loads to the village of Valley for the purpose of shipping it, he found a gross discrepancy between the weights of the hay as made on the plaintiff's scales and as made on the scales at Valley, where the hay was loaded for shipment and sale; that after discovering this variance he notified plaintiff that there was something wrong with her weights, and refused to take any more hay from the place, unless he was permitted to pay for it when weighed at Valley, or when weighed by the railroad. He testified, and offered other evidence to corroborate him to some extent, that she refused to allow any hay to be taken from her land, unless weighed on her scales and paid for according to such weights. Plaintiff admits that there was a controversy about the correctness of the weights on her scales, but says that she offered to have the scales inspected and adjusted, and finally offered to let defendant have the hay weighed on the railroad scales at Valley and paid for according to such weights. Defendant also testified that after he refused to take any more hay, because plaintiff would not allow him to weigh it at Valley before paying for it, she asked him if he would make any further claim to the hay that was left in the field, and that he told her he would not.

This conflicting testimony raised an issue both on the right to rescind and on the measure of damages, if any, which plaintiff should receive. Both of these issues should have been fully and fairly presented to the jury in the instructions. Defendant requested an instruction on the right of rescission because of the alleged fraudulent weights of the hay by plaintiff on the Allen scales, and also one on the measure of damages. Each of these instructions were refused, and it appears that the court attempted to submit defendant's entire theory of the case

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in paragraph 6 of instructions given on its own motion. This instruction is quite lengthy, and contains, among other things, the following direction on defendant's right to rescind for incorrect weights on the Allen scales: "The burden of proof is upon the defendant to establish that the Allen scales were incorrect, and that the plaintiff nevertheless insisted upon the hay being weighed thereon and payments made accordingly, and that the plaintiff declined to permit the removal of the hay except upon these conditions. If defendant has established these propositions by a preponderance of the evidence, then he had a right to refuse to take the remainder of the hay and would not be liable therefor in this action." It seems to us that this direction with reference to the right of rescission is too restricted in its phraseology, and might possibly have led the jury to believe that the only question involved in the right of rescission was the mechanical accuracy or inaccuracy of the scales on which the hay was weighed. While the scales in themselves might have been entirely accurate and of a modern and standard pattern, yet, if they were either carelessly or intentionally manipulated so as to register false weights of the hay to defendant's damage, he would have been fully justified in refusing to take the remainder of the hay according to such weights.

Another portion of this same instruction told the jury: "If you find from the evidence that the plaintiff was willing to permit the defendant to remove the hay and have it weighed at other scales and so notified defendant, then defendant is liable for the full purchase price of the hay, less any payments made thereon, and also less such portion, if any, of said hay at the contract price that the evidence shows has been disposed of or converted by the plaintiff." This portion of the instruction seems faulty on the measure of damages, in that it overlooks the duty which plaintiff owed, when she had notice of defendant's refusal to take the remainder of the hay, to mitigate the damage as far as possible by making reasonable efforts to dispose of the hay so as to prevent an accumulation of

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damage. Under the instruction, as given, unless plaintiff actually took some of the hay into her possession and used or disposed of it after notice of defendant's refusal to comply with the contract, she was permitted to recover the contract price of the hay, less the payment made. On defendant's theory of the contract, the hay was not delivered to him until weighed on the Allen scales. And under this theory, if he refused to take the hay without just cause, plaintiff's measure of damages would have been the difference between the contract price of the hay and its market price at the time and place of delivery. If there was no market value of the hay at the time and place of agreed delivery, then such sum as plaintiff might have realized for the hay by reasonable effort on her part should be deducted from the contract price of the hay in estimating her damages.

We therefore conclude that the action of the trial court in giving this instruction over defendant's objection was prejudicial to his rights, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

ROGER TATTERSALL ET AL., APPELLANTS, V. JAMES NEVELS,
APPELLEE.

FILED DECEMBER 21, 1906. No. 14,828.

1. **Cities: WARDS.** Under the provisions of section 2, art. I, ch. 14, Comp. St. 1903, the mayor and council of a city of the second class may change the number and boundaries of its wards, subject to the limitation therein contained that it shall not have less than two nor more than six wards.

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2. **Partnership: FREEHOLDERS.** Where a partnership firm is the owner in fee of real estate situated in this state, each member of such partnership firm is possessed of a freehold interest in such realty.
3. **Liquor License: EVIDENCE.** Evidence examined, and held sufficient to sustain the judgment of the trial court.

APPEAL from the district court for Boone county:
JAMES N. PAUL, JUDGE. *Affirmed.*

C. E. Spear and H. C. Vail, for appellants.

F. J. Mack, M. W. McGan and J. S. Armstrong, contra.

OLDHAM, C.

This is an appeal from a judgment of the district court for Boone county, Nebraska, sustaining the action of the mayor and council of the city of Albion in granting a license to sell liquors to James Nevels, the applicant therefor. The only allegations of error in the proceedings specifically called to our attention in the assignment of errors filed in this court by the remonstrators are with reference to the sufficiency of the testimony to sustain the finding that certain of the signers of the applicant's petition were resident freeholders of the first ward of Albion. Applicant's petition for a license was filed with the city council on the 19th day of June, 1906, and contained the names of 40 persons, who signed as resident freeholders of the first ward of Albion. A remonstrance was filed by the appellants herein, which alleged, among other things, that the petition was not signed by 30 resident freeholders. It also alleged that certain of the petitioners, naming them, were resident freeholders of the original third ward of Albion, and had been brought into the first ward by a change in the boundary lines of the ward, provided for by ordinance No. 127, which was passed by the mayor and council on the 28th day of May, 1906. The remonstrance also alleged the pendency of the injunction proceedings

against the enforcing of this ordinance, which we have set out and examined in the case of *Young v. City of Albion*, ante, p. 678. Of the 40 original signers to the petition 4 withdrew before the final hearing of the case on the petition and remonstrance. No evidence was introduced tending to show that 5 of the remaining 36 signers were resident freeholders. It was stipulated in the record that 27 of the remaining 31 signers were resident freeholders of the first ward of Albion, as constituted by ordinance No. 127.

It is urged by the remonstrators that there is no authority under the statutes given to cities of the second class to reduce the number of their wards, and that, as the city had been divided into three wards by ordinance No. 98, enacted in the year 1903, the attempted reduction of the number of wards by the passage of ordinance No. 127 was *ultra vires* and void. Section 2, art. I, ch. 14, Comp. St., provides that each city of the second class "shall be divided into not less than two nor more than six wards, as may be provided by ordinance." To our minds this section of the statute plainly and clearly invests the city council of cities of this class with authority to divide the city into wards, within the limitation prescribed; that is, they shall not make more than six nor less than two wards. There is no limitation in the statute as to the number of times that the city may be divided, nor as to the power to either increase or diminish the number of wards within the limits prescribed. We are therefore of opinion that the city council acted within the scope of its delegated powers when it changed the number of wards from three to two.

Under this view of the case we think that the evidence was sufficient to show that the eleven resident freeholders who were added to the first ward by the passage of ordinance No. 127 were competent signers on the petition. Under the stipulation in the record, these, with the others admitted to be resident freeholders, constituted 27 competent signers, and leave but 4 of the 31 in dispute. Of

these four it is urged against the sufficiency of the proof with reference to one, Charles Klever, that the evidence does not show that he is a freeholder in the first ward, and that he nowhere testifies that he is a resident of such ward. This objection would be fatal were it not for the fact that the remonstrance alleged that he (Charles Klever) was among those who were residents of the old third ward and had been brought into the first ward by ordinance No. 127. In view of this allegation of the remonstrance, we think the evidence was sufficient to show him a resident of the first ward. He testified that he was a freeholder and no objection was made to the competency of the evidence. The sufficiency of the proof as to Lester Waring is also challenged. He testified that he was a resident freeholder of the first ward, but on cross-examination it was shown that the property which he claimed to own stood in the name of Waring Brothers, a firm composed of Lester and Fred Waring. It is urged that, as the real estate was owned by the partnership, it should be treated as personal and not as real property. It is true that for certain purposes partnership real estate is treated by a doctrine of equitable conversion as personalty in the settlement of the affairs of the partnership. We think the American rule with reference to partnership real estate is correctly stated in 22 Am. & Eng. Ency. Law (2d ed.), 106, in which it is said: "In the absence of any contrary agreement, express or implied, between the partners, firm realty retains its character as such, with all the incidents of that species of property, except that each share of the partnership realty is impressed with a trust implied by law in favor of the other partner or partners that so far as necessary it shall be first applied to the adjustment of partnership obligations and the payment of whatever balance may be found due between partners on winding up the firm's affairs and, to the extent necessary for these purposes, the character of the property is in equity deemed to be changed into personalty." Under this view of the nature of partnership real property, we think the evidence sufficient to show

that the signer to the petition, Lester Waring, was a resident freeholder of the ward.

It is urged against another of the disputed signers, George W. Williams, that he was not a resident freeholder of the ward, because the evidence showed that at the time he signed the petition the deed to his real estate was held in escrow pending the completion of the title and the payment of part of the purchase money. The evidence, however, showed that before the hearing his title had been completed, and he had received the deed and had placed it on record. We think this showing sufficient. As these 3, added to the 27 already considered, constitute 30 resident freeholders of the ward, it is not necessary to examine the objection urged to the signature of Mary Brown.

Finding no reversible error in the action of the trial court, we recommend that the judgment of the district court be affirmed.

AMES, C., concurs.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ORD HARDWARE COMPANY, APPELLANT, v. J. I. CASE
THRESHING MACHINE COMPANY, APPELLEE.

FILED DECEMBER 21, 1906. No. 14,424.

1. **Foreign Corporations, Actions Against: PROCESS.** Under the provisions of sections 73, 75 of the code, a citizen of this state, who has a cause of action against a foreign corporation growing out of business transactions in this state, may have recourse to the courts of this state by the service of process upon the managing agent of such corporation.
2. ———: **MANAGING AGENT.** An agent of a foreign corporation, whose contract of agency demands of him the exercise of judgment in

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the business matters of his principal, and who has charge of the business of his principal in the territory covered by his contract, is a managing agent within the meaning of sections 73, 75 of the code, providing for the service of summons upon the managing agent of a foreign corporation.

APPEAL from the district court for Valley county:
JAMES R. HANNA, JUDGE. *Reversed.*

A. M. Robbins, for appellant.

O. A. Abbott and H. E. Oleson, contra.

EPPERSON, C.

Plaintiff sued defendant, a Wisconsin corporation, in the district court for Valley county to recover commissions alleged to be due plaintiff, as a former agent of defendant, for the sale of a threshing machine. Summons was issued, and the sheriff's return thereon shows service upon the defendant in Valley county "by delivering to Cornell Brothers, the managing agents of the defendant corporation, a true and certified copy of the summons, the chief officer of the defendant not being found in the county." The defendant filed an answer, and alleged as its first defense that Cornell Brothers were not the defendant's managing agents, and asked the judgment of the court whether it ought to be required to further answer or defend in this suit. The parties stipulated that the matters arising under the plea to the jurisdiction should be tried and determined before trial upon the merits. Upon the trial of this jurisdictional question, the court found that Cornell Brothers were not the managing agents of the defendant, and that the court had not acquired jurisdiction over the defendant. From a judgment of dismissal, the plaintiff appeals to this court.

Section 73 of the code provides: "A summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or, if its chief officer is not found in the

county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office or last usual place of business of such corporation." This section applies to foreign as well as domestic corporations. *Fremont, E. & M. V. R. Co. v. New York, C. & St. L. R. Co.*, 66 Neb. 159.

Section 75 of the code provides: "When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent." If Cornell Brothers were the managing agents of the defendant within the meaning of either of the statutes above quoted, service upon them was sufficient, and the judgment of the trial court wrong.

The contract of agency between defendant and Cornell Brothers was introduced in evidence. It contains a statement that the agency thereby created was special, and not general. However, the provisions of the contract fixing the authority of Cornell Brothers as agents should govern, rather than this general statement. By the contract defendant appointed Cornell Brothers agents for the sale of its machinery and repairs in the city of Ord, Nebraska. It provided that such agents should diligently canvass for purchasers, and in all reasonable and proper ways to promote the trade and interest of the company, to sell only for cash, or to responsible purchasers who have given ample security for time payments. Such agents were required to satisfy themselves that all notes are signed by responsible men of known credit and good reputation for paying debts, were prohibited from representing any other company engaged in the same business as that of the defendant, were to store and care for and to insure the property of the defendant, to set up and start machinery sold, and to properly remedy all complaints as far as possible without calling upon the company for help, and to keep the company's account separate and apart from other accounts. The evidence shows that Cornell Brothers had the possession of one threshing machine belonging to the

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defendant and exhibited it for advertising purposes, and that they carried a stock of repairs belonging to defendant. Defendant had no business in Ord other than that conducted through these agents.

It was evidently the intention of the legislature that a citizen of this state, who has a cause of action growing out of business with a foreign corporation through an agent in this state, should have recourse to the courts of this state, and not be required to carry their grievances to the courts of another state or country. In *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb. 552, it is said:

"It is the policy of our law to afford redress through our courts to any person aggrieved, whether a natural person or a corporation, and to apply the remedy, as far as possible, at the place where the injury was sustained. If a foreign corporation has an office for business in this state, for the transaction of business, seeking thereby to promote its own interests, such office will also be its place of business where a summons may be served upon it, and a party aggrieved will not be required to go into another jurisdiction to enforce his rights against it. It must take the burden with the benefit."

In view of our statute (sections 73, 75, *supra*), all foreign corporations bringing their business into this state must be held to do so with the understanding that they will be subjected to the jurisdiction of our court by service upon their managing agents in actions brought by citizens of this state upon causes growing out of the business done here. Agents are employed in all kinds of business, and are given authority to represent their principals in such numerous and various matters that it is difficult to find a definition which would apply to any case which may arise. The authorities, we think, are unanimous that a mere sales agent, or one having authority to make sales of the products of his principal, with no additional privileges or duties, is not a general agent, nor one who holds a mere subordinate position, that is, acting under the immediate direction of his principal, without

being required to rely upon his own judgment and discretion in the affairs of his principal. In *Porter v. Chicago & N. W. R. Co.*, 1 Neb. 15, it was held that "an agent invested with the general conduct and control, at a particular place, of the business of a corporation, is a managing agent." The summons in that case was served upon an agent of a foreign corporation, whose duties were to visit occasionally for a few hours the ticket and freight office of the company in this state and confer, when necessary, with its agent. In *White Lake Lumber Co. v. Stone*, 19 Neb. 402, it was held that, "where an agent was entrusted with the business of carrying on a lumber yard, with authority to sell and deliver lumber for cash or on credit as he saw proper, to collect and receive the money of his principal, file and enforce mechanics' liens or not as he should deem best," this was considered sufficient to constitute him a general agent. The authority of the agent there in controversy is very similar to that of the agent upon whom summons was served in the case at bar. The court said in *Fremont, E. & M. V. R. Co. v. New York, C. & St. L. R. Co.*, 66 Neb. 159: "A manager of an agency established in this state by a foreign railroad corporation for the purpose of soliciting traffic over its line of road, is a managing agent within the meaning of the statute with reference to the service of summons upon such corporation." The company whose agency was under consideration in that case had no line of road in this state, and the statutes governing the service of summons upon such companies is the same, so far as managing agents are concerned, as in the case of any foreign corporation. The rule there announced, in our opinion, is applicable to any foreign corporation. In *Persons v. Buffalo City Mills*, 51 N. Y. Supp. 645, it was held: "A managing agent must be some person vested by the corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity, and under the direction and control of superior authority, both in re-

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gard to the extent of his duty, and the manner of executing it." In *Palmer v. Chicago Herald Co.*, 70 Fed. 886, it is said: "An Illinois corporation, publishing a newspaper in Chicago, had continuously in New York an agent who solicited advertisements for such newspaper and had authority to contract for the publication thereof at regular rates, * * * such agent was a 'managing agent' within the meaning of Code Civ. Proc. N. Y., sec. 432," providing that service may be had under certain circumstances on the managing agent of a foreign corporation. It was held in *Brown v. Chicago, M. & St. P. R. Co.*, 12 N. Dak. 61: "An agent who is invested with the general conduct and control, at a particular place, of the business of a corporation, is a managing agent within the meaning of the code which authorizes service of summons on a managing agent of a foreign corporation." To the same effect are *United States v. American Bell T. Co.*, 29 Fed. 17; *Hat-Sewing Mfg. Co. v. Davis Sewing Machine Co.*, 31 Fed. 294; *Great West Mining Co. v. Woodmas*, 12 Colo. 46, 20 Pa. 771; *Poster v. Charles Betcher Lumber Co.*, 5 S. Dak. 51, 58 N. W. 9.

On the other hand, there are cases holding that a managing agent is one who has full and complete authority in all branches of the corporation's business. For instance in Wisconsin the following appears to be the rule: "The managing agent of a corporation is an agent having a general supervision over the affairs of the corporation, and must be an officer of the corporation; and hence a person who is only managing agent in a county, state, or other defined district is not a 'managing agent of a corporation,' having supervision over all its affairs, since the term implies a general supervision of the affairs of the corporation in all its departments, perhaps to a greater extent than is implied by any other single officer, so called, as a president, cashier, secretary, or treasurer. It is usually understood to designate the person who has the most general control over the affairs of the corporation and who has knowledge of all of its business and property."

and who can act in emergencies on his own responsibility. *Upper Mississippi Transp. Co. v. Whittaker*, 16 Wis. *220; *Farmers Loan & Trust Co. v. Warring*, 20 Wis. *290; *Wheeler & Wilson Mfg. Co. v. Lawson*, 15 N. W. 398, 400, 57 Wis. 400." 5 Words & Phrases, 4321.

After a careful consideration of the authorities, including the decisions of this court, *supra*, we are convinced that the weight of authority and the better rule is to the effect that an agent of a foreign corporation, whose contract of agency demands of him the exercise of judgment in the business affairs of his principal, and who has charge of all of the business of his principal in the territory covered by his contract, is a managing agent within the meaning of the statutes above quoted.

In applying that rule to this case, we have not lost sight of the fact that defendant herein had an agent in this state, with headquarters in Lincoln, who may or may not be a managing agent. The function of the Lincoln agency seems to be to make contracts with other agents throughout the state, such as the contract here in evidence, and, further, to collect the notes of the company, and to distribute the machinery of the company to the different agencies. The so-called state agent did not supervise the Ord agency nor control their conduct. Cornell Brothers derived their authority from the contract alone, and conducted themselves according to its provisions; and by its terms, and their conduct in pursuance thereof, the nature of the agency must be determined. It was not intended by sections 73, 75, *supra*, that such agent should be the only managing agent in the state; but, if the management of the foreign corporation's business in the district or sphere of the activity for which the agency was created is general in its nature, summons may be served upon such managing agent. Cornell Brothers were not mere subordinates. It is true they were required to take only cash or amply secured notes from purchasers; but it is not shown that any other agent or officer of the company had greater authority, nor is it shown that any other agent

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or officer managed the business at Ord. The maintaining of the agency was but a part of an extensive system which the defendant had in furthering its own interests. The contract introduced in evidence confers upon the agent the duty of promoting the trade and interests of the company, and to see that customers, to whom credit was extended, are responsible parties, and, in case of complaint, to remedy the same as far as possible without calling upon the company for help. This demanded of the agents the exercise of their own judgment in business matters, and thereby to direct and control, or, in other words, to manage, the defendant's affairs. Cornell Brothers, and ~~any~~ other, managed the business at Ord.

We therefore recommend that the judgment of the district court be reversed and the cause remanded.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

EDWARD W. SIMERAL, APPELLEE, V. EDWARD ROSEWATER
ET AL., APPELLANTS.

FILED DECEMBER 21, 1906. No. 14,561.

Appeal: MOTION FOR NEW TRIAL. A motion for a new trial on the ground of an abuse of discretion on the part of the trial court in proceeding with the trial in the absence of defendants and their counsel is itself addressed to the sound discretion of the court, and the judgment will not be reversed by the reviewing court unless an abuse of discretion is shown.

APPEAL from the district court for Douglas county.
HOWARD KENNEDY, JR., JUDGE. *Affirmed.*

W. J. Connell, for appellants.

William F. Gurley and *J. W. West*, *contra*.

EPPERSON, C.

The defendants seek a reversal of the judgment of the district court for Douglas county on the ground of an abuse of discretion in proceeding to trial in the absence of defendants or their attorney. The case was tried before Judge Kennedy, and judgment rendered for plaintiff: A motion for a new trial was overruled, and defendants appeal.

The only question discussed in the briefs is an abuse of discretion on the part of the trial court in proceeding with the trial in the absence of defendants and their counsel. It appears from the evidence that the rules of the district court for Douglas county provide that, when an attorney is actually engaged before one of the judges of the district court, he is never required to appear in a case before another judge until the first case is disposed of, and that, when a case is announced for trial before one of the judges, to be taken up as soon as a case on trial before the other is disposed of, and, where one of the attorneys is engaged in both cases, it is the duty of the attorney to appear for the trial of the case so called when the case pending before the other judge is disposed of. Such a rule is necessary in counties having two or more judges sitting at the same time. It also appears from the record that the case at bar was first announced for trial May 23, 1905, and was passed until June 16, 1905, on account of defendants' counsel being engaged in the trial of other cases. On the morning of June 16, defendants' counsel was engaged in the trial of a cause, referred to in the record as the *Mort* case, before Judge Redick, but appeared before Judge Kennedy and announced that the *Mort* case probably soon would be settled. Judge Kennedy then announced that the trial of the case at bar would proceed

upon the termination of the *Mort* case. When the *Mort* case was disposed of, counsel for defendants herein participated in the trial of another case, referred to as the *Pierce* case, immediately called before Judge Redick, without informing the latter, until the jury was called, that the case at bar had been called, and had been announced for trial and was awaiting his presence before Judge Kennedy. He did, however, appear before Judge Kennedy, and announced that he was engaged in the *Pierce* case, and that counsel and the court could go ahead, if they liked, he would not be there. Counsel for defendants is very active in the legal profession, representing many litigants and trying many cases in the district court for Douglas county, and in other courts. On the call for June 16, 1905, there were 34 cases in which he was employed. All this shows the necessity of the rule above referred to. It appears from the affidavit of defendants' counsel that, after the jury had been called in the *Pierce* case, his dilemma was explained to Judge Redick, and affiant asked that the *Pierce* case be delayed until this case was disposed of, and that Judge Redick refused because the jury had been called. It also appears that Honorable John L. Webster was employed in the *Pierce* case, but that he expected to leave Omaha Monday evening, June 16, before the conclusion of the trial. It was not shown that Judge Redick was informed that the case at bar was set for trial before the *Pierce* case was called, but that defendants' counsel or his associate announced that they were ready for the trial of the *Pierce* case. In this it seems that defendants' counsel was in error, for the rules required his attendance before Judge Kennedy immediately upon the disposition of the *Mort* case.

The motion herein was addressed to the sound discretion of the trial court. It involved a consideration of the rules of practice, and, unless there was an abuse of discretion, the ruling upon the motion should not be disturbed by this court. It does not appear that ordinary prudence was used by defendants' counsel to extricate himself from

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his dilemma, which, it appears from the court's findings, was of his own making. It being a matter of discretion, no abuse of which is shown, either in the trial or in the overruling of the motion for a new trial, it would be contrary to the rules of practice to disturb the judgment complained of. See *Zimmerer v. Fremont Nat. Bank*, 59 Neb. 665.

We therefore recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

EDWARD A. MCCORMACK, APPELLANT, V. FRANK TINCHER
ET AL., APPELLEES.

FILED DECEMBER 21, 1906. No. 14,547.

Garnishment: EXEMPT WAGES: NONRESIDENTS. A nonresident of this state is not entitled to the benefits of, and cannot maintain an action based on, the act entitled "An act to provide for the better protection of the earnings of laborers, servants and other employees of corporations, firms, or individuals engaged in interstate business," being sections 531e-531f of the code.

APPEAL from the district court for Jefferson county:
WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

Heasty & Barnes, for appellant.

J. C. Hartigan, contra.

DUFFIE, C.

The facts in this case, as they appear from the pleadings and from the admission of the parties on the oral argument, are as follows: Edward McCormack, the appel-

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lant, is the head of a family, resides at McFarland, Kansas, and is in the employ of the Chicago, Rock Island & Pacific Railway Company. Tincher & Dickenson Brothers, the appellees, are merchants doing business in Fairbury, Nebraska. Sometime prior to the commencement of this action, McCormack being indebted to the appellees, they commenced a suit against him at Fairbury, and caused the Chicago, Rock Island & Pacific Railway Company to be garnished. At that time the company was indebted to him in the sum of \$50 for wages earned within the preceding 60 days. Immediately upon being garnished, the railroad company discharged him, and in order to be reinstated he executed the bond provided by section 949 of the code, and obtained a discharge of the attachment. Thereafter he commenced an action in county court against Tincher & Dickenson Brothers under the provisions of sections 531c-531f of the code, where judgment was given him for the damages claimed. Tincher & Dickenson Brothers appealed to the district court, where a demurrer to the petition of the plaintiff was sustained, and the case dismissed. From this judgment the case has been brought here for review.

The demurrer raised the sufficiency of the petition to constitute a cause of action, it not being alleged that McCormack was a resident of this state, and this raises the question whether a nonresident of the state is entitled to the relief awarded by the sections of the statute above referred to, or whether that statute, and the remedy afforded the employees whose wages have been garnished, was intended only for the residents of the state. Section 531c is in the following language: "That it be and is hereby declared unlawful for any creditor of, or other holder of any evidence of debt, book account, or claim of any name or nature against any laborer, servant, clerk, or other employee, of any corporation, firm or individual, in this state, for the purpose below stated, to sell, assign, transfer, or by any means dispose of any such claim, book account, bill or debt of any name or nature whatever, to any person

or persons, firm, corporation or institution, or to institute, in this state or elsewhere, or prosecute any suit or action for any such claim or debt against any such laborer, servant, clerk, or employee by any process seeking to seize, attach, or garnish the wages of such person or persons earned within sixty days prior to the commencement of such proceeding, for the purpose of avoiding the effect of the laws of the state of Nebraska concerning exemptions." That the statute is not plain and unambiguous clearly appears from a first reading thereof, and the point under consideration turns upon the question whether the phrase "in this state" following the word "individual" refers to the employer or the employee. That it was intended to define and locate the residence of one or the other of these parties is manifest. That it was not intended to refer to the residence of the employer is also quite apparent from the title of the act, which is: "An act to provide for the better protection of the earnings of laborers, servants and other employees of corporations, firms, or individuals engaged in interstate business." This title contemplates that the residence of the employer may be in this state or in a sister state, the qualification as to him being that he shall be engaged in interstate commerce and be subject to garnishment in some sister state. Again, it could not have been the intention of the legislature to prohibit a resident of this state from sending a claim held by him against a resident of an adjoining state, the employee of a railway operated through both states, to be sued there, and the rights of the parties determined by the laws of the state where the debtor resides.

By the holding of this court in *Wright v. Chicago, B. & Q. R. Co.*, 19 Neb. 175, the nonresident debtor was amply protected prior to the passage of this act, the holding being that he could claim his exemption of 60 days' wages in a suit brought against him in this state, although a nonresident. The state of Iowa refused to extend the exemption of workmen's wages to nonresidents of the state, and,

prior to the enactment of this law, the practice had grown into a custom for creditors here, holding claims against residents in the employ of the Union Pacific and other roads doing an interstate business, to sell or assign their claim to some party in Iowa, who brought suit upon it there, and in that manner evaded the provisions of our exemption laws. It was to protect our own citizens from this practice, and not nonresidents who were not subject to this abuse, that the statute was passed, and, in the light of the circumstances calling for its passage, there is no doubt that it was the intention of the legislature to confine its benefits to residents of the state, and the phrase "in this state," before referred to, was undoubtedly used to define the residence of the employee. While the question was never before squarely presented to the court, our former decisions all indicate that this was the construction which should be given the law. In *Bishop v. Middleton*, 43 Neb. 10, it is said: "The act should be construed with reference to its object. Its object was to prevent the evasion of our exemption law by garnishment of a corporation employing a man in this state, but having such a *situs* in another state as to permit of its being reached by legal process there." In *Singer Mfg. Co. v. Fleming*, 39 Neb. 691, it is said: "The wrong was in seizing the debt situated in Nebraska, payable in Nebraska to a citizen of Nebraska." We hold, therefore, that a nonresident cannot maintain an action under this statute, and that the demurrer was properly sustained.

We recommend an affirmance of the judgment of the district court.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

HARRY H. BURLING V. ESTATE OF GEORGE ALLVORD.

FILED DECEMBER 21, 1906. No. 14,047.

1. Decedent's Estate: CLAIMS: LIMITATIONS. A claim against the estate of a decedent, which had accrued or become absolute before the expiration of the time fixed by the court for filing claims, is barred if not filed within that time. Section 226, ch. 23, Comp. St.
2. Fraud: ACTION: LIMITATIONS. The claim of a vendee against the vendor of real estate for damages for false and fraudulent representations with respect to the title accrues immediately upon the perpetration of the fraud, and is not postponed to such time as he sustains actual loss.
3. Decedent's Estate: CLAIMS: LIMITATIONS. The fact that the claimant did not discover the fraud until after the expiration of the time fixed for filing claims against his vendor's estate does not extend the time for filing his claim, the nonclaim statute making no exception in favor of cases of that character.

ERROR to the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

M. B. Davis, Samuel Rinaker and R. S. Bibb, for plaintiff in error.

E. O. Kretsinger, contra.

ALBERT, C.

At the date of his decease, which occurred some time previous to January 25, 1897, Coke A. Collett held a contract of sale for 80 acres of school land in Gage county, Nebraska. He was living on this land with his wife and an only child, Lulu May Collett, at the time of his death, the same being their homestead. January 25, 1897, his widow, who had again married and whose name was then Mary Connor, sold and assigned this school land contract to George Allvord, and in August, 1898, he sold and assigned the same to Harry H. Burling, the plaintiff herein, for \$2,000, subject to the amount still due the state. Mrs. Connor, the former wife of Coke A. Collett, died

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on March 25, 1897, previous to the assignment by Allvord to the plaintiff. Some time after this assignment Allvord died, an administrator of his estate was duly appointed, and the probate court entered an order, in accordance with the provisions of section 217, ch. 23, Comp. St. 1903, requiring all claims against his estate to be filed within six months from May 4, 1900, of which due notice was given. It is conceded that Collett died intestate, and that his widow never obtained any order of court for the sale and transfer of the school land contract made to Allvord. From this statement it will be seen that on Collett's death his widow became possessed of a life estate in the 80 acres of school land covered by the land contract, and that the remainder descended to his daughter and only heir. Section 17, ch. 36, Comp. St. Her assignment to Allvord conveyed, therefore, only her life estate, and this was extinguished by her death March 25, 1897, and previous to the assignment made by Allvord to the plaintiff. Such assignment, therefore, conveyed no title to the plaintiff, but, as we understand from the record, he took and held possession up to February, 1902. Some time previous to February 7, 1902, Lulu May Collett, who had then attained her majority, asserted title to the land and employed an attorney to bring proceedings to recover possession. On being notified of this claim, the plaintiff, accompanied by his attorney, went to Fairbury, where Miss Collett was then residing, and purchased her title, paying therefor the sum of \$1,400. April 17, 1902, the plaintiff filed his claim against the estate of George Allvord for the sum of \$1,400 paid to Miss Collett, and for a further sum of expenses incurred in and about securing her title. It will be seen that this claim was filed some 18 months after the expiration of the time fixed by the probate court for filing claims. The probate court refused to allow the claim, and the plaintiff appealed to the district court, alleging in his petition that at the time he took an assignment of this contract Allvord falsely and fraudulently stated and represented that he had good title to the con-

tract; that he possessed all the right, title and interest in and to the land described in and conveyed by said contract, and had good right and lawful authority to sell the same and the premises conveyed therein, subject only to the interest of the state of Nebraska which, it is conceded, was the sum remaining unpaid thereon, being about \$500; that plaintiff relied on said representations, knew nothing to the contrary, and had no knowledge of the outstanding title until January, 1902. The district court held that the claim was barred, and on that theory directed a verdict for the estate. After perfecting an appeal, the plaintiff died, and the cause was revived in the name of his administratrix.

Is the claim barred? To find the answer to this question we must look, not to the general statute of limitations fixing the time within which actions may be brought, but to the specific provisions of the decedent act limiting the time for filing claims against estates of deceased persons. Section 226, ch. 23, Comp. St., as it stood prior to its amendment in 1901, is as follows: "Every person having a claim against a deceased person proper to be allowed by the judge or commissioners, who shall not, after the giving of notice as required in the two hundred and fourteenth section of this chapter, exhibit his claim to the judge or commissioners, within the time limited by the court for that purpose, shall be forever barred from recovering such demand or from setting off the same in any action whatever." This section was amended in 1901 so as to include claims of every character, "whether due or to grow due, whether absolute or contingent." From our recital of the facts it will be seen that the claim was filed long after the expiration of the time fixed by the probate court for the filing of claims, and is unquestionably barred by the provisions of section 226, *supra*, unless there be some other provision of the statute governing the case.

It is contended, however, that Burling's claim did not accrue or become absolute until he bought the outstanding title of Lulu May Collett in order to avoid eviction, and,

consequently, that the claim falls within the provisions of section 262, ch. 23, Comp. St., which is as follows: "If the claim of any person shall accrue or become absolute at any time after the time limited for creditors to present their claims, the person having such claim may present it to the probate court, and prove the same at any time within one year after it shall accrue or become absolute; and if established in the manner provided in this subdivision, the executor or administrator shall be required to pay it, if he shall have sufficient assets for that purpose, and shall be required to pay such part as he shall have assets to pay, and if real or personal estate shall afterwards come to his possession, he shall be required to pay such claim, or such part as he may have assets sufficient to pay, not exceeding the proportion of the other creditors, in such time as the probate court may prescribe." Whether the amendment of sec. 226; *supra*, in 1901, operates as a repeal by implication of sec. 262, and, if so, whether plaintiff's claim, growing out of a transaction antedating such repeal, is affected thereby, are questions admitting of some doubt, but we do not deem it necessary to go into them, because we are satisfied that the claim is not one that accrued or became absolute after the expiration of the time limited for creditors to file their claims. It should be kept in mind that the claim is not for a breach of covenant of title or seisin, but for damages for alleged false and fraudulent representations. If it were the former, then the authorities holding that no right of action accrues until an eviction, actual or constructive, would be in point. But the claim is founded on alleged false and fraudulent representations made by Allvord with respect to his title. The alleged wrong was fully perpetrated when Burling parted with his money on the strength of such representations. The authorities are nearly uniform that in cases of this character a cause of action arises at once upon the perpetration of the fraud. In the well-considered case of *Northrop v. Hill*, 57 N. Y. 351, it was said:

"When a party to a contract is guilty of fraud, he com-

mits a wrong for which he is liable to the defrauded party, to pay, at least, nominal damages. The act of entering into contract relations implies that the parties are to deal in good faith with each other. On no other basis can the minds of the parties be expected to meet. If one of them, professing in this way to act in good faith, in fact, commits a fraud, he breaks the implied obligation he is under, and should be made to respond in damages. It is no answer to say that the defrauded party may rescind the contract. That course is at his option. He may elect to affirm it, and have his action for such damages as he may prove, whether substantial or otherwise. If he proves no special damage, he should, at least, recover nominal damages for the breach of the implied promise to act in good faith. It is familiar law that a party may have an action for breach of duty, though he sustains no positive damage and there is no intention to do wrong."

In support of this rule the court quotes from the case of *Allaire v. Whitney*, 1 Hill (N. Y.), 848, as follows: "Once established, therefore, that in all matters of pecuniary dealings, in all matters of contract, a man has a *legal right to demand that his neighbor shall be honest*, and the consequence follows, viz., if he be drawn into a contract by fraud, this is an injury actionable *per se*. Indeed it would not be difficult, in all such cases, to show the degree of actual damage. The time of the injured party has been consumed in doing a vain thing, and time is money. * * * Fraud is a thing grievously amiss, and, above all, odious to the law; and fraud in a contract can hardly be conceived without being attended with damage in fact."

The plaintiff undoubtedly had an action for damages when the fraud was perpetrated. That he did not and could not know the full damages he might sustain at the time does not alone toll the statute until the full consequences are known. In the leading case of *Betts v. Norris*, 21 Me. 314, 38 Am. Dec. 264, this question was thoroughly

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examined, and the courts of this country have followed that decision with great unanimity. The action was one against a deputy sheriff for nonfeasance in not attaching sufficient property in favor of the plaintiff to satisfy a judgment afterwards recovered thereon. It was then argued, as here, that the cause of action did not accrue until it was ascertained what damage had been sustained. In answer to this the court said:

"In the case at bar, whether the defendant, by not attaching more property, did the plaintiff a wrong, depended upon the amount of his debt. That amount did not depend on any subsequent proceeding. It was the same at the time he commenced his suit for it, that it was at the rendition of judgment; with the exception of the damage for the detention of the debt. The wrong done to the plaintiff, therefore, occurred when the nonfeasance took place, and not when it came to be ascertained, by subsequent events, what the precise amount of the injury turned out to be."

If we are right in supposing that the plaintiff had a cause of action when the contract was closed and the money paid, there can be no doubt that the bar of the statute then commenced to run in favor of the defendant, unless saved by the exception relating to a nondiscovery of the fraud. In Wood, Limitations (3d ed.), sec. 177, it is said: "In the case of torts arising *quasi ex contractu* the statute usually commences to run from the date of the tort, not from the occurrence of actual damage." And in sec. 178, he further states the rule as follows: "Although, as has been seen, time commences usually to run in defendant's favor from the time of his wrongdoing, and not from the time of the occurrence to the plaintiff of actual consequential damage, yet in order to produce this result it is necessary that the wrongdoing should be such that nominal damages may be immediately recovered." In his brief the plaintiff has cited cases to the effect that, on a sale of personal property where possession was delivered, it is no defense to an action for the price that the vendor

had no title to the property sold, as long as the vendee is not disturbed in his possession of the property. *Linton v. Porter*, 31 Ill. 107; *Webster v. Laws*, 89 N. Car. 224; *Gross v. Kierski*, 41 Cal. 111, and *Close v. Crossland*, 47 Minn. 500. Those cases, we think, have no application here. In every sale of personal property there is an implied warranty on the part of the vendor that he has good title to the same. Until breach of warranty by the assertion and enforcement of a superior title the vendee has no cause of action. His action, then, is upon contract, upon the warranty of his vendor, and no cause of action can, in the nature of things, accrue until a breach of the warranty. Here the action is for a tort, for the fraud committed. The distinction between the cases is radical and obvious.

But it is contended on behalf of the plaintiff that the claim should not be held to have accrued or become absolute until the discovery of the fraud. The general statute of limitations expressly provides that actions for relief on the ground of fraud shall not be held to have accrued until the discovery of the fraud. But, as we have seen, this action is governed by the statute of nonclaim, and not by the general statute of limitations. The statute of nonclaim makes no exception in favor of claims grounded on fraud. The general rule, supported by an almost unbroken line of authorities, is that the statute of nonclaim runs in all cases and under all circumstances, unless otherwise provided. 8 Am. & Eng. Ency. Law. 1079; 18 Cyc. 471. There are exceptions to this rule, but none covering plaintiff's claim. The plaintiff's claim accrued and became absolute, within the meaning of the statute, during the lifetime of Allvord and does not, therefore, come within the provision of section 262 of the decedent act, but within the provisions of section 226, whereby all claims not filed against the estate within the time fixed by the probate court for the filing of claims are forever barred. We see no escape from the conclusion reached by the learned district court. We reach this conclusion with less reluctance, because of grave doubts

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in our minds whether the plaintiff would be entitled to recover were the bar of the statute removed.

It is therefore recommended that the judgment of the district court be affirmed.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

SCHLITZ BREWING COMPANY, APPELLEE, v. HANS NIELSEN,
APPELLANT.

FILED DECEMBER 21, 1906. No. 14,574.

1. **Landlord and Tenant: RESTRICTIONS IN LEASE.** Where a lease provides that no beer, save of a particular manufacture, shall be sold on the premises, the fact that the excepted beer cannot be lawfully obtained does not annul the restrictive clause of the lease, while the fact that such beer could not be lawfully obtained was known to both parties when the lease was made.
2. **Lease: ENFORCEMENT.** Where such lease in itself is lawful and does not contravene no requirement of public policy, and is supported by an independent consideration, the fact that the lessor is a member of a combination formed for the purpose of controlling the price of some product is no defense to a suit to enforce the restrictive clause.
3. **Injunction.** Ordinarily, in a suit brought for that purpose, the plaintiff is entitled to an injunction without a showing of actual damages or that irreparable injury will result from a continued violation of the restrictive clause.
4. **Lease: ENFORCEMENT.** Although the lease provides that in case of a violation of the restrictive clause the rights of the lessee thereunder shall be forfeited, and although upon such violation the plaintiff declares a forfeiture, yet, so long as the defendant refuses to recognize the forfeiture and remains in possession under the lease, his right to the use of the premises is to be measured by the lease, and the restrictive clause is enforceable against him.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

I. J. Dunn, for appellant.

Rich, Scarle & Clapp, contra.

ALBERT, C.

On the first day of January, 1905, the Joseph Schlitz Brewing Company, plaintiff, and Hans Nielsen, defendant, entered into the following contract in writing: "This memorandum of agreement made and entered into this first day of January, 1905, by and between Hans Nielsen of Omaha, Nebraska, party of the first part, and the Joseph Schlitz Brewing Company of Milwaukee, Wisconsin, party of the second part: Witnesseth, that, whereas the said Joseph Schlitz Brewing Company has this day loaned to the said party of the first part the sum of \$1,000, it is agreed and understood by and between the said parties hereto that the said sum of money is to be repaid by the said party of the first part to the said party of the second part in instalments of \$24.50 each, due and payable weekly hereafter, the first of said instalments falling due on the second day of January, 1905; said sum so advanced to draw interest at the rate of — per cent. per annum from the — day of — 190—. And whereas the Joseph Schlitz Brewing Company has rented to the above party of the first part the saloon store and the storeroom adjoining the saloon now used as a baker shop and the south upstairs flat, the rent to be included in the above payment of \$24.50. The rent to be payable in advance and said party of the first part to pay all expense for water and light. Adv. license and bond expense included. And in further consideration of the fact, the said party of the first part agrees, for the space of one year, to use no other beer than that manufactured and furnished by the said Joseph Schlitz Brewing Company. And in case the

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said party of the first part shall use at his place of business any other beer than that manufactured or furnished by the said Joseph Schlitz Brewing Company, without the written consent of the said Joseph Schlitz Brewing Company, then, in that case, the entire sum above advanced shall at once become due and payable, and all rights under this contract shall by the party of the first part be forfeited. It is further agreed that the said party of the first part shall pay for all beer sold and delivered to him at the following rates: Keg beer, \$7 per bl.; bottled beer, export quarts or pints, \$3.75, with a rebate of \$1.25 for each case of empty bottles returned subject to any rise in the general market price of said beer. The said party of the first part further agrees to pay for beer delivered to him during any one week upon the first Monday following the said delivery, and the failure of the party of the first part to pay any sum of money so due for beer delivered theretofore to him, shall at once forfeit all his rights under this contract, and all sums of money as above set forth shall at once become due and payable from the said party of the first part to the said Joseph Schlitz Brewing Company. In witness whereof, the said parties have hereunto set their hands and seals this 1st day of Jan., A. D. 1904. (sic.) Hans Nielsen, Jos. Schlitz Brewing Co., Otto Siemsen. Witness: D. Jensen."

At the time the contract was made the defendant was already in possession of the premises as tenant of the plaintiff and thereafter continued in possession by virtue of the foregoing contract. In May or June, following the making of the contract, he began to buy beer from other parties and to retail it on the premises in question. Whereupon the plaintiff, claiming a forfeiture of the lease, gave the defendant three days' notice to vacate the premises, declared the remainder of the instalments due, and brought a suit at law for the recovery of the entire amount. Afterwards the plaintiff brought this suit to restrain the defendant from selling any beer, other than that manufactured and furnished by the plaintiff, on the premises.

ises in question. The trial court found for the plaintiff, and granted the relief prayed. The defendant appeals.

It is admitted that the plaintiff is a corporation organized under the laws of the state of Wisconsin, and that it has become domesticated by the filing of its articles of incorporation with our secretary of state and complying with the requirements in that behalf. It is also admitted that on the first day of January, 1905, a license was issued to the plaintiff by the authorities of the city of Omaha authorizing it to sell beer at its warehouse in that city, and that at the time of making the contract in question it was contemplated by the parties thereto that the sales of beer from the plaintiff to the defendant should be made in the city of Omaha.

One position taken by the defendant is that a license for the sale of intoxicating liquors cannot lawfully issue to a corporation, whether domestic or foreign, and, consequently, that the contract between the plaintiff and the defendant, so far as it contemplates a sale of beer from the former to the latter, is legally impossible of performance. If this were a suit to compel the defendant to buy beer of the plaintiff in the city of Omaha, whether the plaintiff could lawfully sell beer there would be a pertinent question. But this suit was not brought for this purpose. In fact, the contract itself contains no clause expressly requiring the plaintiff to furnish beer to the defendant. It merely fixes the price which the defendant shall pay for such beer as the plaintiff may furnish to him. If, as the defendant contends, the plaintiff cannot lawfully make a sale of beer in the city of Omaha, and cannot be lawfully licensed to make such sale, both parties must be presumed to have been aware of that fact when the contract was made, and to have contracted with reference to it. In other words, if the defendant's construction of the license law be correct, he knowingly bound himself to sell no beer on the premises, save such beer as he could not lawfully obtain. The suit is not to compel him to buy beer contrary to law, but to restrain him from selling

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beer contrary to the terms of his lease. It would have been perfectly competent for the parties to stipulate that no beer whatever should be sold on the premises. It was equally competent for them to provide that no beer except of a particular kind or quality should be sold thereon. And if it turns out that the beer exempted from the restrictive clause cannot be obtained, especially where the parties at the time they made the contract knew that it could not be lawfully obtained, that fact would not operate to annul the restrictive clause.

Another position taken by the defendant is that the plaintiff at the time of making the contract was a member of a trust, as defined by section 1, ch. 91a, Comp. S. 1903, which was formed for the purpose of controlling the trade in brewery products in the city of Omaha, and that the contract therefore is not enforceable. In the first place, this is not a suit to enforce the entire contract, but merely to restrain the defendant from a continued violation of a restrictive covenant of his lease. The contract itself is not unlawful and contravenes no requirement of public policy. It is supported by an independent consideration. That being true, if, as claimed by the defendant, the plaintiff was a member of a trust, the agreement between the members thereof was only incidentally or indirectly connected with the contract in suit, and does not taint the latter with illegality or make it contrary to public policy. *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352; *Fearnley v. B. Mainville*, 5 Colo. App. 441; *Phalen v. Clark*, 19 Conn. 424, 50 Am. Dec. 253; *McDermott v. Sedgwick*, 140 Mo. 172, 39 S. W. 776.

It is insisted that the plaintiff has failed to show that it has no adequate remedy at law or that irreparable damage would result from a continued violation of the restrictive covenant, and therefore that it is not entitled to the writ. In 4 Pomeroy, Equity Jurisprudence (3d ed.), sec. 1432, referring to the enforcement of covenants of this character, the author says: "The injunction in this class of cases"

granted almost as a matter of course upon a breach of the covenant. The amount of damages, and even the fact that the plaintiff has sustained *any* pecuniary damages, are wholly immaterial. In the words of one of the ablest of modern equity judges: 'It is clearly established by authority that there is sufficient to justify the court interfering, if there has been a breach of the covenant. It is not for the court, but the plaintiffs, to estimate the amount of damages that arises from the injury inflicted upon them. The moment the court finds that there has been a breach of the covenant, that is an injury, and the court has no right to measure it, and no right to refuse to the plaintiff the specific performance of his contract, although his remedy is that which I have described,' namely an injunction." In 2 High, Injunctions (4th ed.), sec. 1142, it is said: "And where a lessee is, by the terms of his lease, restricted to a particular use of the demised premises, equity will restrain him from other use of them, even though no irreparable injury be shown to result from such breach of covenant. The interference in such case is based upon the ground that, while there is a remedy at law for breach of the covenant on the part of the lessee, a new suit would have to be brought daily for each daily repetition of the offense, and an injunction is therefore necessary to prevent a multiplicity of suits, as well as on the ground of the great difficulty in estimating damages at law for such a grievance." In this case the plaintiff has established the terms of the contract or lease, and the violation of the restrictive clause is admitted. Those facts, in the light of the authorities just quoted, entitle it to relief by injunction.

It is contended that, as the contract contains no express agreement on the part of the plaintiff to furnish the defendant with beer of its own manufacture, the contract lacks mutuality and is not enforceable. The contract as a whole is supported by a sufficient consideration. The covenant in question is a mere restriction on the use of the premises by the defendant. He took the lease subject to

that restriction. The parties had a right to make a contract to suit themselves. The plaintiff had a right to provide that premises owned by it, whether used for the sale of its own products or not, should not be used to extend the trade of its competitors. If, then, the contract does not obligate the plaintiff to furnish the defendant with beer, it is still the contract of the parties, and its enforcement requires the defendant to do or abstain from nothing which he did not voluntarily undertake to do or abstain from doing.

Another contention of the defendant is that the plaintiff, having declared a forfeiture and brought an action at law for the recovery of the whole amount of the deferred instalments, cannot maintain this suit to enforce the restrictive covenant of the lease. That this contention may be understood, we take the following from the defendant's brief: "The contract provided the penalty which the defendant would be subjected to if he failed to perform the contract; that plaintiff should have the right to recover all of the unpaid portion of the \$1,000 advanced by it, at once, and to recover possession of the premises from the defendant. It pursued both remedies by commencing suit for the remainder of the \$1,000 and giving the defendant notice to quit the premises. Furthermore, the contract did not leave it to plaintiff's option, but provided absolutely that all of the defendant's rights under the contract should be forfeited and immediately cease upon his failure to live up to its terms. He violated the contract; therefore, according to its terms, the contract immediately came to an end, so far as defendant's rights were concerned. Plaintiff, in addition, elected to pursue its remedy at law. * * * It would be a strange rule of law that would permit one party to declare the contract at an end and to claim the penalty named in the contract in a court of law, and then permit him to pursue the remedy of requiring specific performance in a court of equity." There would be great force in this contention, if the contract would admit of the construction that the exaction of

the penalty there imposed for the doing of the forbidden act was intended by the parties as an equivalent for the privilege of doing that act. 2 High, Injunctions (4th ed.), sec. 1139. But manifestly such was not the intention of the parties, because by the very language of the covenant the exaction of the penalty would not only prevent the doing of the forbidden act, but would terminate the defendant's right to use the premises for any purpose. The rule is that, where the covenant is absolute in its terms, and a penalty is attached to insure the faithful performance of the obligations thereby imposed, the exaction of the penalty will not deprive equity of its jurisdiction to restrain the commission of the forbidden act. Section 1139, *supra*. *A fortiori* a mere attempt, as in this case, to exact the penalty would not deprive it of such jurisdiction.

Nor does the doctrine of an election of remedies apply. That doctrine cannot be successfully invoked against a party, unless it appear that he has pursued one of two coexisting remedies, so inconsistent that the choice of one necessarily amounts to an abandonment of the other. *State v. Bank of Commerce*, 61 Neb. 22. Here, although the plaintiff declared a forfeiture and commenced its action at law for the recovery of its debt, the defendant ignored the notice to vacate the premises and retained the possession which it had obtained under and by virtue of the lease. So long as he thus retains possession, his rights with respect to the use of the premises are to be measured by the terms of that instrument. It would be a remarkable rule that would give a tenant in possession under a lease which he had forfeited greater rights than he would have had, had he kept his covenants. It does not seem to us that an attempt to enforce a forfeiture is in any way inconsistent with a suit to compel the tenant to observe the restrictive covenants, so long as he resists the forfeiture and retains possession under the lease.

In our opinion, the record shows that the plaintiff was

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entitled to the relief granted, and we recommend that the decree be affirmed.

JACKSON, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

JOPHES H. MALONE, APPELLANT, v. AMERICAN SMELTING & REFINING COMPANY, APPELLEE.

FILED DECEMBER 21, 1906. No. 14,586.

Master and Servant: ACTION FOR DAMAGES: DIRECTING VERDICT. It is error to hold, as a matter of law, that an employee 24 years old, of average intelligence and fair education, is chargeable with knowledge that to throw a bucket of water into the fire box of a smelting furnace, containing a bed of highly heated coals, about 9 feet long, 3 or 4 feet wide and 3 feet deep, is liable to result in a dangerous explosion, where the evidence warrants the inference that he did the act in obedience to an order from the foreman under whom he worked.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JR., JUDGE. *Reversed.*

Weaver & Giller, for appellant.

John C. Cowin, contra.

ALBERT, C.

Jophes H. Malone brought an action against the American Smelting and Refining Company to recover damages for personal injuries sustained by him while in the employ of the defendant. It is alleged in the petition that, while he was in the employ of the defendant, the defendant's foreman, under whom he worked, ordered and directed the plaintiff to draw the fire from the furnaces; that in the

performance of that work a rubber hose was ordinarily used to throw water on the fire, but on this occasion when the plaintiff proceeded to obey the said order of the foreman the hose could not be found; that the plaintiff thereupon reported to the foreman that he was unable to find the hose, whereupon the foreman ordered and directed the plaintiff to take a bucket and use it instead of the hose for throwing water on the fire; that the plaintiff was not familiar with the work of drawing the fires, which was usually performed by the foreman himself, and that the same was outside the scope of the usual duties devolving upon the plaintiff; that in obedience to the order and direction of the foreman plaintiff took the bucket and threw water therefrom on the fires, and that, in consequence, a large amount of steam was generated, which caused an explosion whereby the plaintiff sustained serious physical injuries; that said plaintiff's said injuries are the proximate result of the defendant's negligence in directing the plaintiff to undertake said work, its omission to provide proper appliances for the performance thereof and to warn or instruct the plaintiff with respect to the danger incident thereto. The answer admits that, while the plaintiff was in defendant's employ, he was injured by an explosion caused by his throwing water on the fires with a bucket, but denies that he was ordered to use the bucket for that purpose. It alleges, in substance, that the work of drawing the fires was in the line of plaintiff's duty; that he was familiar with said work; that he voluntarily assumed the risks incident thereto, and that his injuries, to the extent that he sustained any, were wholly due to his own negligence. The reply consists of a general denial. At the conclusion of the evidence adduced by the plaintiff, the defendant interposed a motion for the direction of a verdict in its favor, which the court sustained, and judgment went accordingly. The plaintiff appeals, insisting that the evidence was sufficient to warrant a submission of the cause to the jury.

That the plaintiff was injured while in the employ of

the defendant is admitted by the pleadings; the nature and extent of such injuries, and the other elements constituting a basis for the computation of damages, if any are recoverable, are conclusively established by the evidence. Hence, if the judgment of the trial court be sustained, it must be because the evidence fails to establish the charge of negligence against the defendant, or, if such charge be established, because the evidence conclusively shows that the defendant assumed the risk, or that his own negligence contributed to the injury to such an extent as to preclude a recovery. This brings us at once to a consideration of the evidence, which shows substantially the following state of facts: On the 28th day of October, 1903, the plaintiff, then a man of 24 years of age, was and for about three months prior thereto had been employed in the refining department of the defendant's smelting works. His principal duties consisted in assisting to remove the scum from the kettles, to mix the various metals therein, and to carry away the refuse. In the performance of his duties he was at all times subject to the orders and under the direction and control of another employee of the defendant, who is designated as the kettle boss, who had charge of this particular department of the work. On that date the kettle boss ordered the plaintiff to go to the floor below and draw the fires from the furnaces. This work was usually performed by the kettle boss himself and was outside the scope of the plaintiff's employment. The plaintiff was entirely without experience in drawing the fires from the furnaces, save that on a former occasion he had assisted the kettle boss in that work, on which occasion the fires in the furnaces, as well as the hot coals after they were drawn therefrom, were sprinkled with water by means of a rubber hose. When he was directed on the date mentioned to draw the fires from the furnaces, he proceeded at once to the lower floor for that purpose, but was unable to find the hose with which to deaden the fires. He came back, and reported that fact to the kettle boss, who directed him to an ordinary water bucket, hold-

ing about four gallons, and directed him to use that instead of the hose, but gave him no instructions as to how it should be used nor any warning of danger. The plaintiff took the bucket, filled it with water, and threw the water on the hot coals in the furnace. This caused an explosion, which threw the steam and red-hot coals out of the furnace and upon the plaintiff, resulting in the injuries complained of. The fire box was about 9 feet long, between 3 or 4 feet wide and about 3 feet deep, and was full of highly heated coals.

The testimony of the plaintiff is to the effect that he threw the water on the coals to cool them so he could remove them from the furnace; that, while he knew something of the explosive power of steam, yet he did not know, and would not have known had he stopped to consider, that the throwing of a bucket full of water upon the coals in the furnace was attended with any danger. The evidence also shows that the plaintiff is a man of ordinary intelligence and of fair education. The only evidence throwing any light on why water was used in drawing the fires is that of the plaintiff, who, as we have seen, testified that he threw the water on the coals to deaden them to enable him to remove them, and that, on the occasion when he assisted the foreman to draw the fires, he turned the hose both on the coals in the furnace and those that had been drawn out. On the latter occasion, however, he was not called to assist until part of the coals had been withdrawn, but he did not know what had taken place before he got there. A reasonable inference from his evidence on this point, taken in connection with the order of the foreman to use the bucket instead of the hose, is that the usual way of proceeding to draw the fires was to throw water from the hose on the coals both before and after they had been drawn from the furnace, and that, when the hose could not be found, the foreman directed him to use the bucket for that purpose. That it was dangerous to use the bucket for that purpose is shown by the result. The danger was heightened by the

fact that, in order to use it, the plaintiff was compelled to stand within three or four feet of the furnace door. The plaintiff, therefore, was injured while carrying out the orders of the defendant's foreman, and in consequence of the unsuitability of the instrumentality furnished for that purpose, and is entitled to recover, unless the only reasonable inference from the evidence is that he knew of the danger, or was chargeable with knowledge thereof, and assumed the risk, or was guilty of contributory negligence.

The defendant takes the position, that the act which resulted in the injury was so obviously dangerous that a person of plaintiff's age, experience and education must be presumed to have known that it was dangerous. The plaintiff was practically without experience in that kind of work. While something of the expansive power and other properties of steam is quite generally known, the particular circumstances in which the sudden conversion of water into steam is attended with danger is by no means a matter of common knowledge. In *Swift & Co. v. Creasy*, 9 Kan. App. 303, it was held that a man employed as an ash wheeler in an engine house is not chargeable with knowledge that the consequence of suddenly turning a stream of water on a burning building, in which there is a large amount of grease, will probably be a dangerous explosion. In *La Fortune v. Jolly*, 167 Mass. 170, it was held that it could not be said, as a matter of law, that an inexperienced servant was chargeable with knowledge that an explosion of gas formed by combustion was among the probable consequences of thrusting too many shavings into a furnace, thereby stopping the draft and preventing the escape of the gas. In *McGowan v. La Plata Mining & Smelting Co.*, 9 Fed. 861, it was held that the explosive power of hot slag, when thrown into water, is not presumed to be known by an ordinary workman without special training or experience. See, also, *Ribich v. Lake Superior Smelting Co.*, 123 Mich. 401. In *Smith v. Peninsular Car Works*, 60 Mich.

501, it was held that there was no presumption that an employee in an iron foundry had knowledge of the effect of molten iron being thrown upon ice.

In the case at bar, the plaintiff testifies that he did not know that the act which resulted in his injury was attended with any danger. It is not an unreasonable inference from the evidence that the plaintiff, in throwing the water on the fire, was acting in obedience to an order of defendant's foreman under whom he worked. He had a right to rely, to some extent, on the superior skill and knowledge of the foreman in whose charge defendant had placed him. 1 Labatt, Master and Servant, sec. 440. We do not wish to be understood to hold that his testimony in that respect is conclusive, or that the evidence adduced, taken as a whole, entitled him to a verdict. But we do hold that the evidence does not warrant the court in holding, as a matter of law, either that the defendant was free from negligence, or that the plaintiff assumed the risk or was injured as a proximate result of his own negligence. It discloses a state of facts from which reasonable minds might reach wholly different conclusions with respect to the ultimate facts essential to a recovery, and therefore should have been submitted to the jury under proper instructions from the court.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

JACKSON, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

FRED C. COULTON, APPELLANT, v. LYDIA E. POPE, APPELLEE.

FILED DECEMBER 21, 1906. No. 14,568.

Wills: APPEAL: RETAXING COSTS. The power of the court to act under the provisions of section 14, ch. 20, Comp. St. 1903, relating to appeals in probate matters, may be invoked by motion to correct the judgment, made at the same term.

APPEAL from the district court for Merrick county:
CONRAD HOLLENBECK, JUDGE. *Affirmed.*

W. T. Thompson and John C. Martin, for appellant.

J. J. Sullivan, F. Dolezal and Patterson & Patterson, contra.

JACKSON, C.

The appellee, as proponent, had judgment in the district court in an action appealed from the county court admitting to probate the will of J. H. Pope, deceased. By the terms of the judgment, as it was first entered, the costs were taxed to the estate. At the same term the court, on motion of the proponent, retaxed the costs and taxed all of the costs of the appeal, including an attorney's fee of \$100, to the contestant. This action was taken under the provisions of section 44, ch. 20, Comp. St. 1903, relating to appeals in probate matters, where it is provided: "If it shall appear to the court that such appeal was taken vexatiously or for delay, the court shall adjudge that the appellant shall pay the costs thereof, including an attorney's fee, to the adverse party, the court to fix the amount thereof." The contestant appeals.

The evidence taken in support of the motion has not been preserved in a bill of exceptions, and the question presented is one of practice. The appellant contends that the original journal entry shows an adjudication of the question of costs, and that, being an adjudication thereof,

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it could only be attacked by a motion for a new trial within three days after the rendition of the judgment, and could not be reached by a motion to retax costs, which is a proceeding to reach mere clerical errors in the entry of costs by the clerk of the court. This contention cannot be sustained. Courts of general jurisdiction have authority to change, correct, revise and vacate their own judgments at any time during the term at which they were rendered and before rights have become vested thereunder. *Harris v. State*, 24 Neb. 803; *Bradley v. Slater*, 55 Neb. 334. No motion for a new trial was necessary to procure an adjudication of the rights of the proponent to have the costs taxed to the contestant. That question was properly presented by motion at the same term at which the judgment was rendered and the judgment is amply supported by the record. It is complained that no notice of the motion was given to the appellant. That, however, was without prejudice, as the appellant appeared by his counsel and resisted the motion.

We find no error in the record, and recommend that the judgment of the district court be affirmed.

ALBERT, C., concurs.

DUFFIE, C., took no part in the decision.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

IDA R. LYONS ET AL., APPELLANTS, V. SAMANTHA CARR
ET AL., APPELLEES.

FILED DECEMBER 21, 1906. No. 14,579.

1. **Quieting Title: LIMITATIONS.** The statute of limitations commences to run against an action brought under the provisions of section 57, ch. 73, Comp. St., from the time the adverse claim attaches.

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2. ———: ———. The fact that certain of the plaintiffs in such an action are minors, who claim title through descent, does not toll the statute, where it appears that the statute had commenced to run during the lifetime of their ancestors.

APPEAL from the district court for Dawson county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

H. D. Rhea and Billingsley & Greene, for appellants.

Warrington & Stewart and H. M. Sinclair, contra.

JACKSON, C.

Joshua Emanuel died intestate in Dawson county on April 6, 1887. He owned and occupied with his wife as a homestead the land in controversy, which was of less value than \$2,000. The widow moved to the state of Michigan, where she remarried, and is still living. The personal property was insufficient to pay the debts and charges allowed against the estate, and the administrator sold the homestead under a license obtained in the district court to George W. Benedict for the sum of \$400, subject to a mortgage indebtedness of \$300. The sale was confirmed September 23, 1890. Benedict deeded the land to R. D. V. Carr, who paid the \$400 purchase money bid by Benedict at the administrator's sale. Both the administrator's deed and the deed from Benedict were executed under date of October 20, 1891, but the deed from Benedict to Carr was not recorded until February 13, 1904, and the administrator's deed until February 16, 1905. The premises have, since the sale to Carr, been occupied and controlled by tenants of Carr and his grantees. Emanuel left six children surviving him, two of whom were minors, Samuel R., aged 18, and Catherine L., aged 17. Samuel R. Carr died a bachelor in 1890, his mother and the five remaining children of Joshua Emanuel inherited his interest in the estate. A daughter, Sarah A. Crawford, died April 6, 1896, leaving five minor children, who are of

the plaintiffs in this action. The homestead being of less value than \$2,000, the sale by the administrator was void. *Tindall v. Peterson*, 71 Neb. 160. On April 24, 1905, the widow and surviving children of Joshua Emanuel, joining with the minor children of Sarah A. Crawford, instituted this action in the district court for Dawson county to quiet the title as against those claiming under the administrator's sale, and for an accounting of the rents and profits. The defense is the statute of limitations. The finding of the district court was for the defendants, and the plaintiffs appeal.

On behalf of the appellants it is insisted, first, that the case is to be governed by section 117, ch. 23, Comp. St., and the exceptions noted in the following section. That section of the statute, however, applies to irregular administrators' sales, but not to sales that are absolutely void. *Brandon v. Jensen*, 74 Neb. 569.

It is next contended that the statute of limitations against the action to quiet the title could not run against the children of Joshua Emanuel until the death of the widow, who held the life estate. The rule, however, under our statute is that an action to quiet the title to real estate may be maintained by the remainderman during the continuance of the particular estate. *Hall v. Hooper*, 47 Neb. 111. And the statute of limitations commences to run at the time the adverse claim attaches. *First Nat. Bank v. Pilger*, 78 Neb. 168. But it is said that, in any event, the statute could not run against the plaintiffs who are minors. They claim title, however, by inheritance from their mother, Sarah A. Crawford, and the statute of limitations had commenced to run against her during her lifetime, and neither her death nor the minority of her children could toll the statute. *Ballou v. Sherwood*, 32 Neb. 666.

In addition to the facts already recited, it appears from the record that R. D. V. Carr conveyed the premises by warranty deed to Lot G. Carr January 30, 1894, the deed having been recorded on February 9, 1894. It also ap-

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pears that at least two of the children of Joshua Emanuel were residents of the county at the time the proceedings were instituted by the administrator to sell the land, and one of the children made an ineffectual effort to prevent the sale. These facts, together with the court proceedings, coupled with the possession of the real estate and the deed executed by R. D. V. Carr to Lot G. Carr, constituted notice of the adverse claim which attached more than ten years prior to the commencement of this action.

It follows that the decree of the district court was right, and we recommend that it be affirmed.

ALBERT, C., concurs.

DUFFIE, C., took no part in the decision.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JAMES M. WECKERLY, APPELLEE, V. CADET TAYLOR ET AL,
APPELLANTS.

FILED DECEMBER 21, 1906. No. 14,905.

Equity seeks the real and substantial rights of the parties, and applies the remedy in such manner as to relieve those having the controlling equities.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Reversed with directions.*

George W. Shields, for appellants.

E. Wakeley, A. C. Wakeley and Greene, Breckenridge & Matters, contra.

JACKSON, C.

On March 9, 1901, plaintiff obtained judgment against Cadet Taylor and others, the judgment being in part un-

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satisfied, and on February 20, 1904, this action was instituted by the plaintiff against Cadet Taylor, Emma L. Taylor, his wife, and the Employers' Liability Assurance Corporation, Limited. The action is in the nature of a creditor's bill, and seeks to subject money, which it is claimed is due the defendant Cadet Taylor from the assurance corporation on an accident policy, to the satisfaction of the judgment against Taylor. The defendant Emma L. Taylor answered, claiming, in substance, that she was the beneficiary named in the accident policy, which was issued at her instance and request and the premium paid out of her own funds; that she applied for a policy wherein she was to be named as the beneficiary; that after the policy was issued her husband made a formal assignment thereof for the purpose of curing any defects or ambiguities in the policy from which it might appear that any part of the moneys payable under its terms might be payable to the defendant Cadet Taylor; that it was originally intended by all the parties that she should be the sole beneficiary named in the policy. She also asked that the policy might be reformed, if it should be determined that any part of the moneys that might be payable under the provisions of the policy were payable to Cadet Taylor.

The assurance corporation answered, denying that it made any agreement with the defendant Emma L. Taylor to pay her any moneys under the provisions of the policy, except in case of the accidental death of Cadet Taylor, and admitting a liability of \$1,250, which it offered to pay to the person entitled thereto. The decree was for the plaintiff, requiring the assurance corporation to pay the plaintiff \$1,250, admitted liability. The defendant Emma L. Taylor appeals.

The facts with reference to the issuance of the policy are: That Cadet Taylor had left his home in Omaha for the purpose of a journey. His wife, Emma L. Taylor, requested her brother-in-law, W. B. Taylor, to procure an accident policy payable to her. W. B. Taylor applied to Frank S. Brownlee, district manager of the Preferred

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Accident Insurance Company of Omaha, for such a policy. Brownlee came to Taylor's office with a printed application with blanks where the necessary information was to be written in. The application was filled out by Brownlee, and signed: "Cadet Taylor, by W. B. Taylor." The only reference to the beneficiary in the application is in this language: "Policy to be payable, in case of death by accident under its provisions, to (beneficiary's name in full) Emma L. Taylor. Residence—Omaha, Neb. Relationship—wife." It appears that the Preferred Accident Insurance Company would not issue a policy except upon the written application of the person whose life or safety was thereby insured; and Brownlee applied to Webster, Howard & Company, agents for the defendant assurance corporation, for a policy, furnishing the necessary and required information for that purpose. The defendant assurance corporation issued its policy, called a "combined accident policy." It provided for the payment of \$5,000 to Emma L. Taylor, wife of Cadet Taylor, if death resulted from accident, and also contained provisions for the payment of weekly benefits in case of disability arising from accident. The premium was paid by Emma L. Taylor from her own private funds. The policy was delivered by Brownlee to W. B. Taylor, and he, in turn, delivered it to Emma L. Taylor. W. B. Taylor testified that, when he applied to Brownlee for the policy, he stated that Mrs. Taylor desired a policy in which she should be named as the sole beneficiary, and that Brownlee agreed to procure such a policy. The only conflict in the evidence is as to what occurred at that time. Brownlee testified that he had no recollection of making any such agreement, and, in effect, denied that such an agreement was made. The policy was issued under date of May 16, 1903, to take effect on May 15. On the 17th of October, 1903, Cadet Taylor made a formal assignment of all sums of money then accrued, or that might accrue and be payable to him under the provisions of the policy, to Emma L. Taylor, his wife. It is claimed that this assignment was fraud-

ulent as to his creditors, and it is upon that theory, doubtless, that the district court entered a decree favorable to the plaintiff.

Elaborate arguments are made on behalf of the appellee Weckerly and the assurance corporation to show that all benefits provided for by the policy, except for death loss, were payable to Cadet Taylor, and it is as strenuously insisted by appellant that all benefits were payable to her; but, in view of the conclusion that we have reached, it is not important to determine that question. We entertain no doubt but that the appellant applied and paid for an accident policy, in which she was to be named as the beneficiary, and the fact that the policy, as it was issued, might be construed as contended for by the assurance corporation and Weckerly, should not, in an equitable action where the court looks to the substance rather than to the form, deprive her of the benefits of the transaction. Such benefits as have accrued were produced by the investment of her own funds, and were the result of the prudential course pursued by her for her own protection and the protection of the family, a benefit fund to which the creditors have no legal, moral or equitable claim. No reformation of the contract was necessary. If any part of the benefits accruing under the provisions of the policy were, by the terms of the policy, payable to Cadet Taylor, that infirmity was remedied by the assignment executed by him prior to the commencement of this action. Nor can it be said that the assignment was without consideration. No consideration was necessary except the original consideration paid as a premium for the policy. It served to perform the purpose originally intended when the premium was paid by Mrs. Taylor. The amount of the premium is lightly referred to by counsel in the brief on behalf of the assurance corporation as being insignificant. It is sufficient to say that the company issuing the policy fixed a price with which the court is not concerned.

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The decree of the district court was erroneous, and it is recommended that it be reversed and the cause remanded, with instructions to enter decree in conformity with the conclusion here reached.

ALBERT, C., concurs.

DUFFIE, C., took no part in the decision.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded, with instructions to enter decree in conformity with the conclusion here reached.

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- The depositary of funds in escrow is entitled to prove any facts which would defeat plaintiff's claim thereto. *Brockway v. Reynolds*..... 225

Estoppel. See APPEAL AND ERROR, 2. ASSIGNMENTS FOR BENEFIT OF CREDITORS. ATTORNEY AND CLIENT, 9. INSURANCE, 15. MUNICIPAL CORPORATIONS, 2. PRINCIPAL AND SURETY, 1.

- Estoppel will not supply the want of power, or make valid an act prohibited by statute. *Weatherington v. Smith*.... 363

Evidence. See APPEAL AND ERROR, 6-8. CONTRACTS, 4. CRIMINAL LAW. TRIAL.

1. A transcript of a justice's docket of another state is receivable in evidence if it conforms to sec. 415 of the code relating to judgments of justices of the peace of another state. *Gordon Bros. v. Wageman*..... 185
2. Oral testimony is admissible to supply omitted covenants not inconsistent with written memorandum. *De Laval Separator Co. v. Jelinek*..... 192
3. In an action for injury at a railroad crossing certain evidence held properly excluded. *Union P. R. Co. v. Connolly*.. 254
4. In an action for the killing of an employee as the result of a defective condition in an engine, evidence of a declaration of the engineer regarding such defective condition, made at the time, is admissible as a part of the *res gestæ*. *Union P. R. Co. v. Edmondson*..... 682

Execution. See JUDGMENT, 7.

Executors and Administrators. See APPEAL AND ERROR, 1.

1. Where a contract for legal services, reasonable and beneficial to the estate, has been entered into by an administrator, it may be enforced. *Estate of Rapp v. Elgutter*..... 674
2. A claim against the estate of a decedent, which became absolute before the expiration of the time fixed for filing

Executors and Administrators—Concluded.

- claims, is barred if not filed within that time. *Burley v. Allword* 81
3. That claimant did not discover fraud of decedent until after the time fixed for filing claims against his vendor's estate does not extend the time for filing his claim. *Burley v. Allword* 81

Exemptions.

1. An account against an employee is an account or claim under secs. 531c-531f of the code relating to garnishment of exempt wages. *Gordon Bros. v. Wageman*..... 15
2. Pleading and proof held sufficient to make a *prima facie* case under sec. 531e of the code, relating to garnishment of exempt wages, though the process under which the wages were garnished was irregularly issued and served. *Gordon Bros. v. Wageman*..... 15
3. A nonresident is not entitled to the benefits of sec. 531c of the code, protecting earnings of laborers and other employees from being garnished as exempt. *McCormack v. Tincher* 15

Fraud. See ACTION, 2. SALES, 6.

- Evidence in an action for false representations in an exchange of properties held to support judgment for defendant. *Morrow v. Lavery*..... 16

Fraudulent Conveyances. See SALES, 9-11.

1. A contract for the sale of personalty, the title to remain in the vendor until the price is paid, is invalid as against purchasers in good faith, judgment and attaching creditors without notice, unless a copy of the contract is filed under sec. 26, ch. 32, Comp. St. *Starr v. Dow*..... 12
2. Gift from husband to wife held not fraudulent as to creditors. *Harvey v. Godding*..... 15
3. Evidence held to establish the *bona fides* of a conveyance from a husband to his wife. *Harvey v. Godding*..... 15
4. Under the facts, deed to wife held not fraudulent as to creditors. *Farmers & Merchants I. Co. v. Brumbaugh*..... 12
5. Transfers between husband and wife upheld. *Weis v. Farley* 12

Gaming.

- Evidence held sufficient to sustain a conviction for keeping gaming tables in violation of sec. 215 of the criminal code. *Stetter v. State*..... 17

Habeas Corpus.

1. Procedure for review in habeas corpus is as in civil actions.
State v. Decker..... 33
2. A habeas corpus proceeding involving the custody of a minor child is a proceeding *in rem*, in which the *res* is the child and its custody. *Terry v. State*..... 612

Highways.

1. The statutory provision that a petition for the establishment or vacation of a public road shall be signed by at least ten electors residing within five miles of the road is jurisdictional. *Letherman v. Hauser*..... 731
2. The facts essential to the jurisdiction of a county board to establish or vacate a public road must affirmatively appear in the record. *Letherman v. Hauser*..... 731
3. An elector residing within five miles of a public road has such special interest therein as will enable him to restrain its unlawful closing. *Letherman v. Hauser*..... 731
4. Evidence held insufficient to prove an abandonment, or adverse occupancy, of a public road. *Perry v. Staple*..... 656

Homestead.

1. Under sec. 4, ch. 36, Comp. St., the homestead of a married person cannot be conveyed or incumbered unless the instrument is executed and acknowledged by both husband and wife. *Weatherington v. Smith*..... 363
2. A departure from the homestead for pleasure, business or health, is not an abandonment thereof. *Weatherington v. Smith* 363
3. Neither spouse can abandon the homestead for the other without his or her free consent. *Weatherington v. Smith*.. 363
4. Neither husband nor wife can abandon the homestead and thereafter convey it to the exclusion of the homestead right of an insane spouse. *Weatherington v. Smith*..... 369

Incest.

- Sec. 204 of the criminal code, defining incest, and providing punishment therefor, is valid and is sufficient in form and substance to create the offense. *Cordson v. State*..... 416

Indians.

- The widow of an allottee of Indian lands has a life estate in the equitable fee, with remainder over. *Reese v. Harlan*.. 485

Indictment and Information.

- Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute. *Cordson v. State*.... 416

Injunction. See HIGHWAYS. 3.

1. In a suit to enjoin the closing of a public road, held that plaintiff had no adequate remedy at law. *Letherman v. Hauser* 721
2. In a suit to enforce a restrictive clause in a lease, plaintiff is entitled to an injunction without a showing of actual damages or irreparable injury. *Schlitz Brewing Co. v. Nielsen* 59

Insane Persons.

1. In proceedings for the appointment of a guardian for an insane person, his next of kin are proper parties and may oppose the granting of the petition. *Prante v. Lompe*..... 57
2. It is error to hear a petition for the appointment of a guardian for an insane person prior to the hour set for the hearing upon the stipulation of such insane person. *Prante v. Lompe* 57

Insurance.

1. Where assessments are increased, held that a beneficial society may deduct from a certificate the difference between the rate of the monthly assessments when the certificate was issued and the increased rate, from the time when the new rate went into effect to date of death of a member, but not for the remainder of the life expectancy. *Shepherd v. Bankers Union of the World*..... 5
2. Assessments of members of a beneficial society may be increased, when necessary to meet the needs of its business. *Shepherd v. Bankers Union of the World*..... 5
3. A policy of insurance in a mutual fire insurance company cannot be avoided for the nonpayment of an assessment, not made for the payment of a loss, unless it affirmatively appears that the statute has been complied with. *Wolcott v. State Farmers M. Ins. Co.*..... 72
4. Mutual fire insurance companies cannot make assessments on their members under sec. 12, ch. 33, laws 1891, until loss has occurred, unless authorized by a two-thirds vote of their directors. *Wolcott v. State Farmers M. Ins. Co.*..... 72
5. A by-law of a mutual fire insurance company which provides "that assessments shall be made by order of the directors, and shall be prorated according to the time the insurance has been in force," is not authority for making assessments at stated intervals. *Wolcott v. State Farmers M. Ins. Co.*..... 72
6. An assessment, levied on part of the membership of a mutual fire insurance company is invalid. *Wolcott v. State Farmers M. Ins. Co.*..... 72

Insurance—Continued.

7. Verbal demands for an appraisal and for examination of the insured under oath are merged in a subsequent written demand therefor. *Citizens Ins. Co. v. Herpolsheimer*, 232
8. A written demand for examination of the insured under oath, held insufficient. *Citizens Ins. Co. v. Herpolsheimer*.. 232
9. One to whom goods are consigned for sale on commission and who accounts to the owner therefor, has an insurable interest therein. *Citizens Ins. Co. v. Herpolsheimer*..... 232
10. False swearing in the proof of loss cannot be predicated on a claim made under advice of an attorney for the price of goods, and for freight, drayage, washing, setting up, etc. *Citizens Ins. Co. v. Herpolsheimer*..... 232
11. To constitute suicide by one not insane, there must be intentional self-destruction. *Sebesta v. Supreme Court of Honor* 249
12. A waiver of a condition will not be implied from an act not consistent with an intention to insist upon performance. *Driscoll v. Modern Brotherhood of America*..... 282
13. Acts relied on as a waiver must be those of the person whose rights are affected by it, or of one authorized to act for him. *Driscoll v. Modern Brotherhood of America*.. 282
14. The unauthorized delivery of a certificate to an applicant for membership in a beneficial association by a subordinate officer before initiation held not a waiver of conditions precedent to membership. *Driscoll v. Modern Brotherhood of America* 282
15. Unauthorized receipt of payments from nonmembers, held not to estop a beneficial association to deny that the persons thus making payment are members. *Driscoll v. Modern Brotherhood of America*..... 282
16. It is not false representation for a married woman who is pregnant to sign an insurance certificate that she is in sound bodily health. *Merriman v. Grand Lodge D. of H.*... 544
17. Where a married woman is an applicant for life insurance, she is not required to inform the company of evidence of pregnancy after her physical examination and application. *Merriman v. Grand Lodge D. of H.*..... 544
18. Both husband and wife have an insurable interest in all household furniture. *Lenagh v. Commercial U. A. Co.*.... 649
19. Where an insurance company consents in writing to an assignment of a policy, and after loss, but before payment, the interests of the insured are made known to the company, they cannot be defeated by a settlement between the

Insurance—Concluded.

- company and the assignee without the consent of the insured. *Lenagh v. Commercial U. A. Co.*..... 40
20. When there is no fraud, accident or mistake as to the description or ownership of property insured it is immaterial by what name the insured is designated in the policy. *Lenagh v. Commercial U. A. Co.*..... 42

Intoxicating Liquors.

1. The burden is on an applicant for liquor license to prove that he is a man of respectable character, when by remonstrance such fact is denied. *Brinkworth v. Shembeck*..... 1
2. In a prosecution under sec. 20, ch. 50, Comp. St., for keeping intoxicating liquors for sale, possession of such liquors by the accused is presumptive evidence of guilt. *Steinkuhler v. State*..... 2
3. A board of village trustees may provide by ordinance for a trial before themselves of a complaint against a saloon-keeper for violation of the statute and ordinances, and on conviction revoke his license. *Langan v. Village of Wolf River* 40
4. Application for liquor license held signed by required number of freeholders. *Tattersall v. Nevels*..... 45

Judgment.

1. The return to the service of a summons in the original action may be impeached in a proceeding to revive the judgment. *Johnson v. Carpenter*..... 0
2. Under sec. 370 of the code, affidavits are admissible to impeach the return to the service of summons in proceedings for revivor. *Johnson v. Carpenter*..... 4
3. The successor of a deceased judgment creditor may, after the expiration of a year, revive a judgment by a bill or a supplemental petition. *Keith v. Bruder*..... 2
4. Petition to revive judgment held sufficient. *Keith v. Bruder* 2
5. An appeal without a supersedeas does not prolong the life of the judgment lien. *Harvey v. Godding*..... 3
6. The provision of sec. 509 of the code, relative to a judgment lien dating from the filing of a mandate, has reference to the special mandate required by sec. 594, where the supreme court renders such a judgment as the lower court should have rendered. *Harvey v. Godding*..... 3
7. A sale of realty under an execution issued on a dormant judgment is void as to one who acquired title from the

Judgment—Concluded.

- judgment debtor during the life of the judgment lien.
Harvey v. Godding..... 289
- 8. An attachment lien is merged in that of the judgment, and ceases to exist when the judgment becomes dormant.
Harvey v. Godding..... 289
- 9. The district court cannot, after the term, amend a judgment as to costs, except under sec. 602 of the code providing for vacating or modifying a judgment. *Meade P. H. & L. Co. v. Irwin*..... 385
- 10. An interlocutory order may be vacated at a subsequent term without compliance with sec. 602 *et sequitur* of the code. *Godfrey v. Cunningham*..... 462
- 11. Where there is an answer setting up a valid defense, that defendant fails to appear when a cause is reached does not entitle plaintiff to judgment without proof, unless the facts admitted make out a case in his favor. *First Nat. Bank v. Sutton M. Co.*..... 596
- 12. The provisions of sec. 602-609 of the code apply to original actions in the supreme court, and it has no power to set aside a judgment and allow the amendment of a petition, in its discretion, after the term. *State v. State Journal Co.* 771
- 13. Although separate decrees are entered after consolidation of suits to quiet title, they are, in effect, one decree, and an order vacating one vacates both. *Schallenberg v. Kroeger*.. 738
- 14. Error cannot be predicated on an order correcting a record of a decree, making it show expressly what it shows by necessary implication. *Schallenberg v. Kroeger*..... 738

Judicial Sales.

- 1. Where a judicial sale is fairly conducted in conformity with the decree it will be ratified. *Omaha L. & B. Ass'n v. Hendee*..... 12
- 2. Where a judicial sale is so conducted that one of the parties is prejudiced without fault on his part, the court may deny confirmation and set aside the sale. *Omaha L. & B. Ass'n v. Hendee*..... 12
- 3. A motion to set aside confirmation of a judicial sale is not waived by filing a motion to set aside interlocutory orders. *Godfrey v. Cunningham*..... 462
- 4. A purchaser at a judicial sale, at which certain apparent liens have been deducted in the appraisalment, is estopped, after confirmation without objection, to dispute their validity. *State v. Several Parcels of Land*..... 647
- 5. Lands used as a single tract may for judicial sale be appraised together. *Moore v. Neece*..... 65

Jury.

When the regular panel of petit jurors is quashed the district court may order jurors to be summoned under sec. 664 of the code. *Russell v. State*..... 12

Justice of the Peace.

1. Defective notice of a conditional order vacating a default judgment does not deprive a justice of jurisdiction over the subject matter. *Brainard & Chamberlain v. Butler, Ryan & Co*..... 7
2. An objection to jurisdiction over the subject matter is a waiver of objection to jurisdiction over the person. *Brainard & Chamberlain v. Butler, Ryan & Co*..... 7
3. An informal entry of a judgment by a justice, held sufficient as against a collateral attack. *Nelson v. Schmoller*..... 7

Landlord and Tenant.

1. The measure of damages for wrongfully withholding possession of leased premises is the rental value less the rent reserved by the lease. *Shutt v. Lockner*..... 12
2. For wrongfully withholding possession of leased premises, special damages may be awarded, where they are certain and the natural result of the wrong complained of. *Shutt v. Lockner*..... 12
3. A vendee of land in the possession of a tenant takes subject to the unexpired term. *Stone v. Snell*..... 14
4. Where a lease provides that the lessor may sell any part of the land by making a corresponding reduction in the rent, he may dedicate a part thereof to the public for a highway. *Segear v. Westcott*..... 15
5. Although a lease provides that a violation of a restrictive clause shall work a forfeiture, and although upon violation plaintiff declares a forfeiture, yet, so long as defendant refuses to recognize the forfeiture and remains in possession under the lease, the restrictive clause is enforceable against him. *Schlitz Brewing Co. v. Nielsen*..... 16
6. Where a lease provides that no beer save that of particular manufacture shall be sold on the premises, that the excepted beer cannot lawfully be obtained does not annul the restrictive clause of the lease. *Schlitz Brewing Co. v. Nielsen*..... 16
7. Where a lease providing that no beer except of a certain manufacture be sold on the premises is lawful, that the lessor is a member of a combination formed to control trade in some product is no defense to a suit to enforce the restrictive clause. *Schlitz Brewing Co. v. Nielsen*..... 16

Libel and Slander.

1. To charge a woman with being a lewd character and with keeping a gambling room is actionable *per se*. *Battles v. Tyson*..... 563
2. Unless words on which a charge of slander is based are plain and unambiguous, the meaning intended by defendant and the understanding of those hearing him should be left to the jury. *Battles v. Tyson*..... 563

Limitation of Actions. See QUIETING TITLE, 2. TAXATION, 12.

That certain plaintiffs in an action to quiet title are minors, who claim title through descent, does not toll the statute of limitations where it had commenced to run during the lifetime of their ancestors. *Lyons v. Carr*..... 383

Malicious Prosecution.

1. An action for malicious prosecution of a civil suit cannot be maintained if there was probable cause. *Cobbey v. State Journal Co.*..... 626
2. Both malice and probable cause must exist to justify an action for malicious prosecution. *Cobbey v. State Journal Co.*..... 626
3. A judgment in a civil suit or a conviction in a criminal suit is *prima facie* evidence of probable cause. *Cobbey v. State Journal Co.*..... 626
4. A suit attacking the constitutionality of an act authorizing the purchase of statutes, *held* not without probable cause. *Cobbey v. State Journal Co.*..... 626

Mandamus.

Mandamus will not lie to compel a county to repair a bridge on a county line without notice to both counties under sec. 116, ch. 78, Comp. St., and the counties must be joined in the action. *State v. Smith*..... 1

Marriage.

Evidence *held* insufficient to show a common law marriage. *Moore v. Flack*..... 52

Master and Servant.

1. A servant engaged in a hazardous occupation assumes the risk of injury from all its obvious dangers. *Anderson v. Union Stock Yards Co.*..... 196
2. Evidence in action for injuries *held* insufficient to support verdict for plaintiff. *Anderson v. Union Stock Yards Co.*... 196
3. In an action for damages caused by alleged defective machinery, evidence of the defective condition immediately before and after the accident is admissible. *Union P. R. Co. v. Edmondson* 682

Master and Servant—Concluded.

4. It is error to hold, as a matter of law, that an employee 24 years old, of average intelligence, is chargeable with knowledge that to throw a bucket of water into the fire box of a smelting furnace, is liable to result in a dangerous explosion, where there is evidence that he acted in obedience to an order from the foreman. *Malone v. American S. & R. Co.*..... 876

Mechanics' Liens.

1. A materialman, to be entitled to a mechanic's lien, must contract with the owner or his authorized agent. *Meade P. H. & L. Co. v. Irwin*..... 385
2. Where a vendor and vendee cooperate in plans for the erection of improvements upon real estate covered by their agreement, the interest of the vendor, as well as that of the vendee, is bound for the payment of liens for labor and material. *Guiou v. Ryckman*..... 833
3. Where a contract is complete and for a specific sum, and is filed with the statement of the lien, a more detailed statement of the account is unnecessary. *Guiou v. Ryckman*.... 833
4. In an affidavit for a mechanic's lien, if there is enough in the description to enable a party familiar with the locality to identify the premises with reasonable certainty, it is sufficient. *Guiou v. Ryckman* 833
5. Evidence held sufficient to show the filing of certain liens. *Guiou v. Ryckman*..... 833

Mortgages.

1. In foreclosure plaintiff must allege and prove, as against the owner of the equity of redemption, that no proceedings at law have been had to recover the debt secured by the mortgage. *McDowell v. Markey*..... 141
2. Though by stipulations in a trust deed the legal title and right of possession may be conveyed to the trustee, the equity of redemption can be extinguished only by judicial foreclosure. *Kirkendall v. Weatherley*..... 421
3. When by stipulations the legal title and right of possession of land are conveyed to a trustee in a trust mortgage, the trustee may, with the acquiescence of the mortgagor, without fraud, convey such legal title and right of possession to the mortgagee in discharge of the debt, and a conveyance by the mortgagor to the mortgagee with intent to extinguish the equity of redemption will have that effect. *Kirkendall v. Weatherley*..... 421
4. The right of redemption and the right to extinguish that

Mortgages—Concluded.

- right by judicial foreclosure are reciprocal. *McCague v. Eller* 531
5. Under a foreclosure and sale, where an equity of redemption in a part of the premises is not extinguished, the plaintiff, being the purchaser at the sale, or his grantee, may foreclose the unextinguished equity of redemption for an unpaid residue of the debt. *McCague v. Eller*..... 531
6. Where a mortgage authorizes the mortgagor to make sales or leases for the benefit of the mortgagee, a sale or lease under such authority is binding on the mortgagee and those claiming under him. *Sammons v. Kearney P. & I. Co.*..... 580
7. In a suit to foreclose a mortgage authorizing the mortgagor to make leases for the benefit of the mortgagee, where the lessee is a party asserting the priority of his lease, the validity of the lease is a legitimate subject of adjudication. *Sammons v. Kearney P. & I. Co.*..... 580
8. A mere purchaser of the equity of redemption of mortgaged lands is given all the protection intended by sec. 16, ch. 78, Comp. St., if he is permitted to deal with safety with one who appears by the record to be the owner of a mortgage securing a nonnegotiable debt. *Bettie v. Tiedgen*.....795, 799
9. Answer in a foreclosure suit held insufficient to entitle defendant to prove that the original mortgagee, to whom payment was made, was acting as agent of an assignee of the original mortgagee whose assignment was recorded. *Bettie v. Tiedgen*..... 799
10. Where a purchaser of the equity of redemption makes payment to the original mortgagee, after assignment of a mortgage duly recorded, and the original mortgagee fails to pay over to the assignee, such payment to the original mortgagee will not discharge the debt. *Bettie v. Tiedgen*.. 799

Municipal Corporations.

1. A judgment in a proceeding under sec. 101, art. I, ch. 14, Comp. St., to detach territory from a municipality will not be reversed in the absence of a showing of mistake of fact or law. *Gregory v. Village of Franklin*..... 62
2. That the owner of unplatted agricultural land tacitly submitted to its inclusion in the incorporated limits of a village does not estop him from proceeding under the statute to have it disconnected. *Barber v. Village of Franklin* 91
3. A city is not liable for damages from a defective crossing

Municipal Corporations—Concluded.

- from private property into a public street. *City of McCook v. Parsons*..... 12
4. In an action for damages for a personal injury, an instruction that a city is liable for negligently permitting a walk in general use by the public over property not shown to be within the corporate limits to be in a dangerous condition, *held* erroneous. *City of McCook v. Parsons*..... 12
5. Sec. 107, ch. 17, laws 1903, does not require the presentation to the city council of a claim for damages for a personal injury, and an appeal, but an original action may be maintained therefor. *Nicholson v. City of South Omaha*..... 71
6. It is not knowledge of a defect in a walk that precludes recovery, but want of care. *Nicholson v. City of South Omaha* 73
7. Notice to city of assignment of salary of a city official must, under sec. 7453, Ann. St., be in writing and be served on the mayor, or acting mayor, or in the absence of both on the city clerk. *Gordon v. City of Omaha*..... 51
8. Evidence *held* insufficient to support finding that appellant was paid a consideration for signing a petition for local improvements, and thereby estopped from questioning the assessment therefor. *State v. Several Parcels of Land*.... 7
9. Under sec. 2, art. I, ch. 14, Comp. St. 1903, the mayor and council of a city of the second class may change the number and boundaries of its wards, subject to the limitation therein contained. *Tattersall v. Nevels*..... 41

Negligence.

1. The doctrine of imputed negligence does not apply to one injured while in a private vehicle, where no privity exists between the injured person and the owner or driver of the vehicle. *Loso v. Lancaster County*..... 46
2. Contributory negligence is usually a question for the jury. *Nicholson v. City of South Omaha*..... 71

New Trial.

1. Newly discovered cumulative evidence, *held* sufficient ground for a new trial, where it is highly probable that it will change the result. *St. Paul Harvester Co. v. Faulhaber*.... 17
2. Secs. 316-318 of the code relating to a motion for a new trial are mandatory. *Carmack v. Erdenberger*..... 35
3. A court has no authority to rule on a motion for a new trial not filed, in anticipation that such motion may be subsequently filed. *Carmack v. Erdenberger*..... 35
4. Where two defendants made separate answers, the court

New Trial—Concluded.

directing a verdict for one and against the other, a joint motion for a new trial, the verdict being good as to one defendant, *held* properly overruled. *Fredrickson v. Schmitt-roth*. 722

Notice.

"Omaha Daily Record" *held* a newspaper, within the meaning of section 497 of the code. *Merrill v. Conroy*. 228

Nuisance.

A party complaining of a public nuisance is not entitled to relief by injunction, unless he shows special injury to himself. *Letherman v. Hauser*. 731

Obstructing Justice.

1. An information for attempting to corrupt a witness must allege that the person sought to be corrupted was a witness; that the defendant knew such person to be a witness, or must state such facts as show conclusively that the defendant had such knowledge. *Gandy v. State*. 782
2. One not summoned or recognized as a witness in a pending suit, and who is not acquainted with either of the parties thereto, and has no knowledge of any of the facts, is not a witness within sec. 164 of the criminal code. *Gandy v. State*. 782
3. On the trial of one charged with attempting to corrupt a witness, *held* reversible error to allow evidence tending to show that defendant offered a person money to steal a written instrument called a power of attorney, where the information contains no such charge. *Gandy v. State*. . . . 782

Partition.

1. After filing a stipulation that an order of sale in partition be vacated, a confirmation without a disposition of the stipulation is an irregularity under sec. 602 of the code. *Godfrey v. Cunningham*. 462
2. Motion to vacate confirmation of a sale in partition for irregularities under sec. 602 of the code *held* sufficient. *Godfrey v. Cunningham*. 462

Partnership.

Where a partnership is the owner in fee of real estate, each member has a freehold interest. *Tattersall v. Nevels*. 843

Pleading. See TRUSTS, 2.

1. A petition alleging a verbal building contract and partial performance, and claiming damages for defendant's failure to perform is not subject to demurrer because it fails to

Pleading—Concluded.

- allege the time within which the contract was to be performed. *Stansbury v. Storer*..... 6
2. Petition held to state a cause of action for relief against an order of the probate court alleged to have been procured by fraud and imposition. *Weeke v. Wortman*..... 47
3. Petition in an action for damages for sale of horses infected with glanders, held not demurrable. *Canham v. Bruegman* 42
4. Petition held not to state a cause of action for maliciously conspiring to injure plaintiff's business. *Cobbey v. State Journal Co.*..... 61
5. Answer in a personal injury case against a street railway company held to tender the issue of contributory negligence. *Lincoln Traction Co. v. Brookover*..... 21
6. The orders or judgments of a court of general jurisdiction may be pleaded in general terms without alleging jurisdictional facts. *Lear v. Brown County*..... 21
7. Permitting amendment of defective pleadings during the progress of the trial held not prejudicial. *Rusho v. Richardson* 34
8. Demurrer for misjoinder of causes of action held properly sustained. *Straun v. First Nat. Bank*..... 41
9. Objection to admission of evidence on the ground that the petition does not state a cause of action may be taken at any time during the trial, and is not waived by answer or failure to demur. *Gordon v. City of Omaha*..... 54
10. Where objection to evidence on ground that the petition does not state a cause of action is sustained, and plaintiff elects to stand on his petition, judgment should be entered for defendant. *Gordon v. City of Omaha*..... 55

Principal and Agent.

1. Evidence held to sustain finding of agency. *Howard v. Omaha Wholesale Grocery Co.*..... 11
2. An agent cannot ratify his own unauthorized acts. *Driscoll v. Modern Brotherhood of America*..... 28
3. An agent is not liable on a contract made for his principal where the other contracting party contracts intending to hold the principal. *Meade P. H. & L. Co. v. Irwin*..... 35
4. When defendant is sued for an accounting for goods under a contract of agency, he may, under a general denial, show the goods were received under another contract. *Acme Harvester Co. v. Curlee*..... 64
5. An agent cannot avail himself of any advantage his agency

Principal and Agent—Concluded.

- may give him to profit out of the subject of the agency.
State v. State Journal Co...... 752
6. A contract of the state with defendant to manufacture the supreme court reports, the plates to become the property of the state, did not constitute defendant the agent of the state. *State v. State Journal Co.*..... 752

Principal and Surety.

1. Where a bonding company, with knowledge of an informality in the execution of a bond by its agent, retains the premium, it is estopped in an action on the bond from urging such informality as a defense. *Farmers & Merchants I. Co. v. United States F. & G. Co.*..... 144
2. To determine the rights of a surety on the bond of a building contractor, held that the building contract and the bond should be construed together. *First Nat. Bank v. School District* 570
3. Where a contractor defaults and the surety completes the building, he is not an assignee as to the reserve in the hands of the owner, but an original party to the trilateral contract. *First Nat. Bank v. School District*..... 570

Process. See JUDGMENT, 2.

- Under sec. 65 of the code, if an action is rightly brought in one county, summons may be issued to another county for service on a corporation. *Cobbey v. State Journal Co.*.. 619

Public Lands.

1. The title of the United States is divested by grant *in presenti* of all lands within the place limits of a railroad aid grant, and subsequent proceedings affecting the patent in the interior department do not suspend the statute of limitations. *Wiese v. Union P. R. Co.*..... 40
2. The acts of congress granting lands to the Union Pacific and Sioux City & Pacific railroads transfer a present legal title, when the terms of the grant are complied with, and a patent to such land, when issued, relates back to the date of the grant. *Wiese v. Union P. R. Co.*..... 40
3. A lessee of school lands or his assignee under ch. 74, laws 1883, may redeem from a forfeiture at any time before the lands are resold or released. *Hile v. Troup*..... 199
4. An assignment of a lease of school lands executed prior to the act of March 5, 1885 (laws 1885, ch. 85), is not affected by the provisions of that act requiring assignments to be recorded. *Hile v. Troup*..... 199

Quieting Title. See **LIMITATION OF ACTIONS.**

1. Evidence in suit to quiet title against mechanics' liens held to sustain decree for plaintiffs. *McMaster v. Douthitt*. 74
2. The statute commences to run against an action to quiet title under sec. 57, ch. 73, Comp. St., from the time the adverse claim attaches. *Lyons v. Carr*..... 82

Railroads.

1. Where a railroad corporation succeeds to the property and rights of another by foreclosure sale, it is not answerable for its general debts. *Lincoln Township v. Kansas City & O. R. Co.*..... 71
2. Where a railroad company for many years has permitted the public without objection to cross its tracks at a certain point, not a public crossing, it owes the duty of reasonable care toward those using the crossing. *Union P. R. Co. v. Connolly*..... 54
3. Warning of the approach of a train at a crossing by ringing the bell and sounding the whistle held not of itself to show due care on the part of a railroad company. *Union P. R. Co. v. Connolly*..... 54
4. Facts stated held to warrant inference of negligence. *Union P. R. Co. v. Connolly*..... 52
5. An instruction as to the duty of a person at a railway crossing to look and listen for approaching trains held proper. *Union P. R. Co. v. Connolly*..... 54
6. Evidence held to sustain finding that plaintiff was injured by reason of defendant's negligence, and that plaintiff was not guilty of contributory negligence. *Union P. R. Co. v. Connolly* 54
7. Evidence in an action for personal injuries held insufficient to sustain judgment for plaintiff. *Clinebell v. Chicago, B. & Q. R. Co.*..... 53
8. A railroad company is not liable for injuries caused by a team taking fright at the ordinary operation of a train. *Clinebell v. Chicago, B. & Q. R. Co.*..... 53
9. Whether a railroad company was excused for not fencing its track at an unincorporated station held a question for the jury. *Rosenberg v. Chicago, B. & Q. R. Co.*..... 62
10. A landowner may recover damages against a railway company for negligently maintaining an insufficient culvert, whereby his lands are flooded, although he may have recovered damages for the location of the road. *Chicago, R. I. & P. R. Co. v. Ely*..... 39

Rape. See **CRIMINAL LAW**, 10.

Real Estate Agents. See **BROKERS.**

Replevin.

1. In an action of replevin, where defendant pleaded breach of warranty, evidence *held* to sustain judgment for defendant. *Port Huron Machinery Co. v. Bragg*..... 357
2. Evidence in replevin action *held* sufficient to show purchaser had knowledge of fraudulent intent of sale. *Rusho v. Richardson* 360

Reports. See **CONTRACTS**, 10, 15.

Sales.

1. Under defense of fraud, negotiations may be traced to their inception, where the evidence thereof tends to establish such defense. *Hauptman v. Pike*..... 105
2. Where the defense to an action on a note is false representations in the sale of personalty, that such representations were made two days before the sale will not justify exclusion of evidence thereof. *Hauptman v. Pike*..... 105
3. Repudiation by the vendor of a substantial condition of a contract of sale on his part to be performed will justify rescission by the vendee. *Rownd v. Hollenbeck*..... 120
4. Evidence *held* to sustain findings. *Rownd v. Hollenbeck*.. 120
5. A bill of sale in payment of an antecedent debt, if taken in good faith, is valid. *Starr v. Dow*..... 172
6. Relief for fraud will not be granted by rescission or damages, where complainant has sustained no pecuniary damages, nor been put in any worse position. *Marquis v. Tri-State Land Co.*..... 353
7. Petition in a suit to rescind a sale for fraud *held* demurrable. *Marquis v. Tri-State Land Co.*..... 353
8. Where a purchaser has advanced money in part performance of a contract, and refuses to proceed, the seller being ready and willing, he cannot recover the money advanced; but to subject the purchaser to the forfeiture it should clearly appear that he has abandoned the contract. *Trauerman v. Nebraska L. & F. Co.*..... 403
9. The creditors of a vendor who has made an illegal sale of his property cannot seize the same unless they can show that its transfer was prejudicial to their rights. *Johns & Sandy v. Reed*..... 492
10. Where the illegal use of property is not in contemplation at the time of sale, a subsequent unlawful use does not render the sale illegal. *Johns & Sandy v. Reed*..... 492
11. A condition in a contract of sale, whereby the title is to

Sales—Concluded.

- remain in the vendor until the price is paid, is void as against purchasers and judgment creditors of the vendee in actual possession, unless in writing, signed by the vendee, and recorded. *Johns & Sandy v. Reed*..... 492
12. Where plaintiff gave his note for a horse, which was taken on a chattel mortgage, and his note had been transferred to a good-faith purchaser, held that he might recover from defendant the amount of his note and interest. *Oaproom v. Mitchell* 563
13. A vendor, by suing on a note given for a machine, by the terms of which title is not to pass until full payment, held to have waived his title. *Fredrickson v. Schmittroth*.. 724
14. Where, after commencement of suit on a note given for a machine, the vendor takes possession by consent to repair it and deliver it to the surety on the note under a contract with the surety only, and fails to redeliver it, the vendee is discharged. *Fredrickson v. Schmittroth*..... 724
15. Where vendee refuses to receive goods contracted for, the measure of damage is the difference between the contract price and their reasonable market value at the time and place of delivery. *Allen v. Rushforth*..... 840

Schools and School Districts.

Prior to the act of February 26, 1879 (laws 1879, p. 170), providing for the issuing and payment of school district bonds, territory detached from a school district, which was subject to an indebtedness, could not be held liable at the suit of a creditor, except on allegation and proof that there was not enough property in the district originally liable to pay the indebtedness. *Manahan v. Adams County*, 829

Seduction.

1. In a prosecution for seduction, evidence of specific acts of lewdness of the prosecuting witness is incompetent. *Russell v. State*.... 519
2. Evidence of repute for chastity should be confined to general reputation for chastity. *Russell v. State*..... 519
3. A teacher's certificate held by the prosecutrix at the time of an alleged seduction is not competent evidence of reputation for chastity. *Russell v. State*..... 519
4. The crime of seduction is not complete unless the illicit intercourse is had under promise of marriage and the promise must be an unconditional one. *Russell v. State*... 519
5. The requirement of the statute that the evidence of the

Seduction—Concluded.

prosecutrix must be corroborated relates both to the illicit intercourse and the promise of marriage. *Russell v. State*.. 519

6. The circumstances relied on as corroborating the prosecuting witness as to the promise of marriage must be of such probative force as to equal the testimony of a disinterested witness. *Russell v. State*..... 519

Specific Performance.

1. In a suit for specific performance, an express repudiation of and refusal to perform a contract by one party, *held* to excuse the other from any subsequent formal tender. *Johnson v. Higgins*..... 35
2. It is not indispensable in a suit for specific performance that plaintiff should have been capable of performance when the contract was entered into, if he was able and offered to perform as stipulated in the agreement. *Johnson v. Higgins* 35
4. Evidence in a suit for specific performance *held* to sustain decree. *Nealon v. McGargill*..... 109
5. Evidence in a suit for specific performance *held* not to support decree. *Steger v. Kosch*..... 147
6. Evidence *held* to support decree for specific performance. *Beam v. Beam*..... 480

Statute of Frauds.

1. Continued possession by a tenant is not such part performance of a verbal contract for the purchase of land as to take the case out of the statute of frauds. *Steger v. Kosch*..... 147
2. Under sec. 5, ch. 32, Comp. St., as amended in 1903, an oral contract for the leasing of lands for more than one year is void. *Thostesen v. Doxsee*..... 536

Statutes.

1. Sec. §171, Ann. St., enacting a penalty for selling glandered horses, *held* not superseded by secs. 3174-3177, an act to prevent the importation or selling of any domestic animal afflicted with a contagious disease. *Canham v. Bruegman*.. 436
2. An enrolled bill, as found on file in the office of the secretary of state, bearing the signature of the legislative officers and approved by the governor, is *prima facie* evidence of its passage. *Stetter v. State*..... 777

Taxation. See CONSTITUTIONAL LAW, 1.

1. A fraternal beneficial association *held* not a charitable association, whose funds are exempt from taxation. *Royal Highlanders v. State*..... 18
2. Where the legislature has passed a new revenue act chang-

Taxation—Continued.

- ing methods of procedure, the courts in construing its provisions are not bound by any administrative construction of the former revenue law. *Royal Highlanders v. State*... 15
3. In taxation of credits, a fraternal beneficiary association is entitled to set off the amount of its outstanding beneficiary certificates against securities devoted exclusively to the payment of such certificates. *Royal Highlanders v. State*.. 15
 4. Where a county board has levied the full amount of tax allowed by law for a county general fund, and designedly levies an excessive bridge tax and transfers a large part thereof to said general fund, the tax transferred is illegal. *Lincoln County v. Chicago, B. & Q. R. Co.*..... 99
 5. In an action to recover an illegal tax paid under protest, the county must show what portion of the tax was legal. *Lincoln County v. Chicago, B. & Q. R. Co.*..... 99
 6. A county must levy taxes required for certain purposes each year, and that its funds have been illegally diverted in the past does not relieve it of such duty. *Lincoln County v. Chicago, B. & Q. R. Co.*..... 99
 7. Under sec. 66, ch. 73, laws 1903, providing that grain brokers shall be assessed on the average amount of capital invested for the preceding year, held that taxing a grain company on its real estate and other tangible property, on its average capital, and also on the grain in its elevators on the first day of April, is, to the extent of the grain so assessed, double taxation. *Central Granaries Co. v. Lancaster County* 311
 8. Under sec. 66, ch. 73, laws 1903, the average capital of grain dealers is to be assessed in addition to the tangible property. *Central Granaries Co. v. Lancaster County*..... 319
 9. Under sec. 66, ch. 73, laws 1903, the average capital of grain dealers is the excess of such capital over real estate and other tangible property. *Central Granaries Co. v. Lancaster County* 327
 10. Average capital of grain brokers cannot be found by adding the amount of purchases or sales and dividing the sum by an arbitrary divisor. *Central Granaries Co. v. Lancaster County* 327
 11. Average capital of grain brokers is the average of cash and all other property; and excess of average capital over real estate and other tangible property is to be added for assessment. *Central Granaries Co. v. Lancaster County*..... 327
 12. A suit to foreclose a tax sale certificate may be commenced

Taxation—Concluded.

- at any time within five years from the date when redemption from the sale may be made by the owner. *Mead v. Brewer* 400
13. Where the holder of a tax sale certificate purchases from the owner the patent title, his tax lien is merged in the legal title, and he cannot assert it in hostility to another tax lien. *Mead v. Brewer*..... 400
14. Where a suit by a county to foreclose a tax lien has proceeded to decree and sale, the taxpayer's right to pay the tax to the county treasurer is superseded by his right to redeem. *Squire v. McCarthy*..... 429
15. Where a county foreclosed a tax lien without a tax sale, held that the acceptance of the taxes before confirmation of sale under the decree is a satisfaction of the decree so far as plaintiff is concerned, and that he may have the sheriff's deed set aside, the land being still in the hands of the original purchaser. *Squire v. McCarthy*..... 431
16. In such case, the loss, if any, is attributable to the negligence of the county treasurer, and the wrongful act of the county in prematurely foreclosing its lien. *Squire v. McCarthy* 431
17. The expression "money deposited in bank," as used in sec. 4 of the revenue act of 1903, includes money on general deposit in bank. *Critchfield v. Nance County*..... 807
18. On appeal from a board of equalization, the cause must be tried on the questions raised by the complaint before that tribunal. *First Nat. Bank v. Webster County*..... 813
19. An assessment of property as ultimately fixed by the board of equalization should not be disturbed on appeal unless clearly erroneous. *First Nat. Bank v. Webster County*..... 815
20. Where a bank owns real estate of a greater value than shown by its books, such excess should be considered in fixing the value of the stock for assessment. *First Nat. Bank v. Webster County* 815
21. National banks are the agents of their stockholders for the purpose of listing their stock in such banks for taxation and paying the tax thereon. *First Nat. Bank v. Webster County*, 815

Trespass.

- Several owners of animals who have constituted of them a joint herd are jointly liable for trespasses committed by such herd. *Wilson v. White*..... 351

Trial. See APPEAL AND ERROR. CRIMINAL LAW.

1. In a case tried to the court, the presumption obtains that the court considered only competent and relevant evidence. *Citizens Ins. Co. v. Herpolsheimer*..... 232
2. Request that the issues made by the answers of certain defendants and those made by the answer and cross-bill of another be tried separately *held* properly denied. *Citizens Ins. Co. v. Herpolsheimer*..... 232
3. Where an order allowing an amendment at the trial recited that it would be considered as denied by the plaintiffs, *held* that a motion for judgment on the pleadings as amended was properly overruled. *Citizens Ins. Co. v. Herpolsheimer*, 232
4. Where an answer to a question is excluded, but substantially the same matter is received in answer to a subsequent question, the error, if any, is cured. *Union P. R. Co. v. Connolly* 254
Flanagan v. Fabens..... 705
5. A mere statement by the foreman of a jury in open court that the jury have agreed is not a verdict. *Union P. R. Co. v. Connolly* 254
6. Error in refusing to receive verdict, *held* waived. *Union P. R. Co. v. Connolly* 254
7. Under the facts, *held* that the trial court properly refused to treat a certain paper as the verdict of the jury. *Union P. R. Co. v. Connolly* 254
8. A verdict is the unanimous decision of a jury, reported to the court, on matters lawfully submitted to them. *Union P. R. Co. v. Connolly*.....254
9. The district court may permit a party to withdraw his rest when no undue advantage is thereby acquired. *Union P. R. Co. v. Edmondson* 682
10. It is discretionary with the trial court to permit the jury to view property which is the subject of litigation. *Alberts v. Husenetter* 699
11. The meaning of instructions is determined by considering all that is said on each branch of the case. *Lincoln Traction Co. v. Brookover*..... 221
12. An instruction which, if standing alone, might be erroneous, may not be so when considered with other instructions on the same subject. *Lincoln Traction Co. v. Brookover*..... 221
13. The court should instruct the jury upon all the issues presented in the pleadings and evidence. *Lincoln Traction Co. v. Brookover* 221

Trial—Concluded.

14. Where the defendant's evidence tends to establish a particular theory, which constitutes a defense, such theory should be submitted to the jury. *Sorenson v. Townsend*..... 499
15. Where there is no evidence to sustain a material allegation of the petition, *held* proper to direct a verdict for defendant. *Keckler v. Modern Brotherhood of America*..... 301
16. Where there is competent testimony tending to support a defense, *held* error to direct a verdict for plaintiff. *Continental Lumber Co. v. Munshaw & Co.*..... 456
17. Where the intention of a party is to be ascertained from disputed circumstances, the inferences to be drawn are for the jury. *Continental Lumber Co. v. Munshaw & Co.*..... 456
18. Where the evidence on a material issue is conflicting, *held* error to direct a verdict. *Gillis v. Paddock*..... 504
19. In an action against a surety on his agreement to take and pay for an automobile where the defense is breach of the agreement, if the evidence is conflicting, *held* error to direct verdict for plaintiff for nominal damages only. *Fredrickson v. Schmittroth* 724
20. Where from the undisputed evidence it appears that plaintiff should not recover, *held* proper to direct a verdict for defendant. *Baker v. Swift & Co.*.....749
21. In the trial of an action at law, it is reversible error to refuse to submit to the jury a legal defense properly pleaded and supported by competent evidence. *Allen v. Rushforth*.. 840

Trover.

Plaintiff in replevin cannot be held for conversion pending trial unless he has appropriated the property, nor after judgment of special ownership in him unless he has done some act inconsistent with the right conferred by the judgment. *Nelson v. Schmoller* 717

Trusts.

1. Where a parent divided his property among his sons, one of whom agreed to pay a certain sum to one of the daughters and he died without having made payment, *held*, that a constructive trust arose which could be enforced against the estate of the deceased by the *cestui que trust* in her own name, though the parent was still living. *Fox v. Fox*.. 601
2. Petition to subject a trust fund to the payment of legal services *held* insufficient. *Leyda v. Reavis*..... 695

Vendor and Purchaser.

1. An executory contract for the sale of land which includes the homestead, not signed by the wife, is not wholly void,

Vendor and Purchaser—Concluded.

- but is obligatory upon the husband, except with respect to the homestead tract. *Johnson v. Higgins*..... 35
- 2. A mere option for the purchase of land, indeterminate as to time and accompanied by a deed deposited in escrow, is terminable on notice by the vendor. *Stone v. Snell*..... 441
- 3. Where a party relies on a record to establish his title and to relieve him of knowledge of secret liens the record must show a perfect title in the grantor. *Weatherington v. Smith*, 363

Waters. See CORPORATIONS, 2.

- 1. The overflow waters of a stream, which run in a well-defined course and again unite with the stream, held part of the watercourse and not surface water. *Brinegar v. Copass*... 241
- 2. Evidence in a suit to prevent diversion of water of a stream, held not to establish defense of adverse user. *Burson v. Percy* 654

Wills.

- 1. Evidence held to sustain finding that claimants were intentionally omitted from a will. *Brown v. Brown*..... 125
- 2. The burden of proof is on a pretermitted child to show that omission to make provision for him in a will was unintentional. *Brown v. Brown*..... 125
- 3. When there is an irreconcilable repugnancy between clauses of a will, the later will prevail over the earlier. *Martley v. Martley* 163
- 4. In construing a will effect will be given to all its provisions. *Martley v. Martley* 163
- 5. A presumption of the due execution of a will arises from the presence of an attestation clause which recites the facts necessary to the validity of the will. *Holyoke v. Sipp*.....394
- 6. The power of the court to act under sec. 14, ch. 20, Comp. St. 1903, relating to appeals in probate matters, may be invoked by motion to correct the judgment, made at the same term. *Coulton v. Pope*..... 882

Witnesses.

- 1. An objection to evidence as incompetent does not go to the competency of the witness. *Brown v. Brown*..... 125
- 2. The provisions of sec. 333 of the code against the disclosure of confidential communications may be waived, and a party calling the attorney who has prepared a will as a witness thereto thereby consents that he may disclose the facts attending its execution. *Brown v. Brown*..... 125

Witnesses—Concluded.

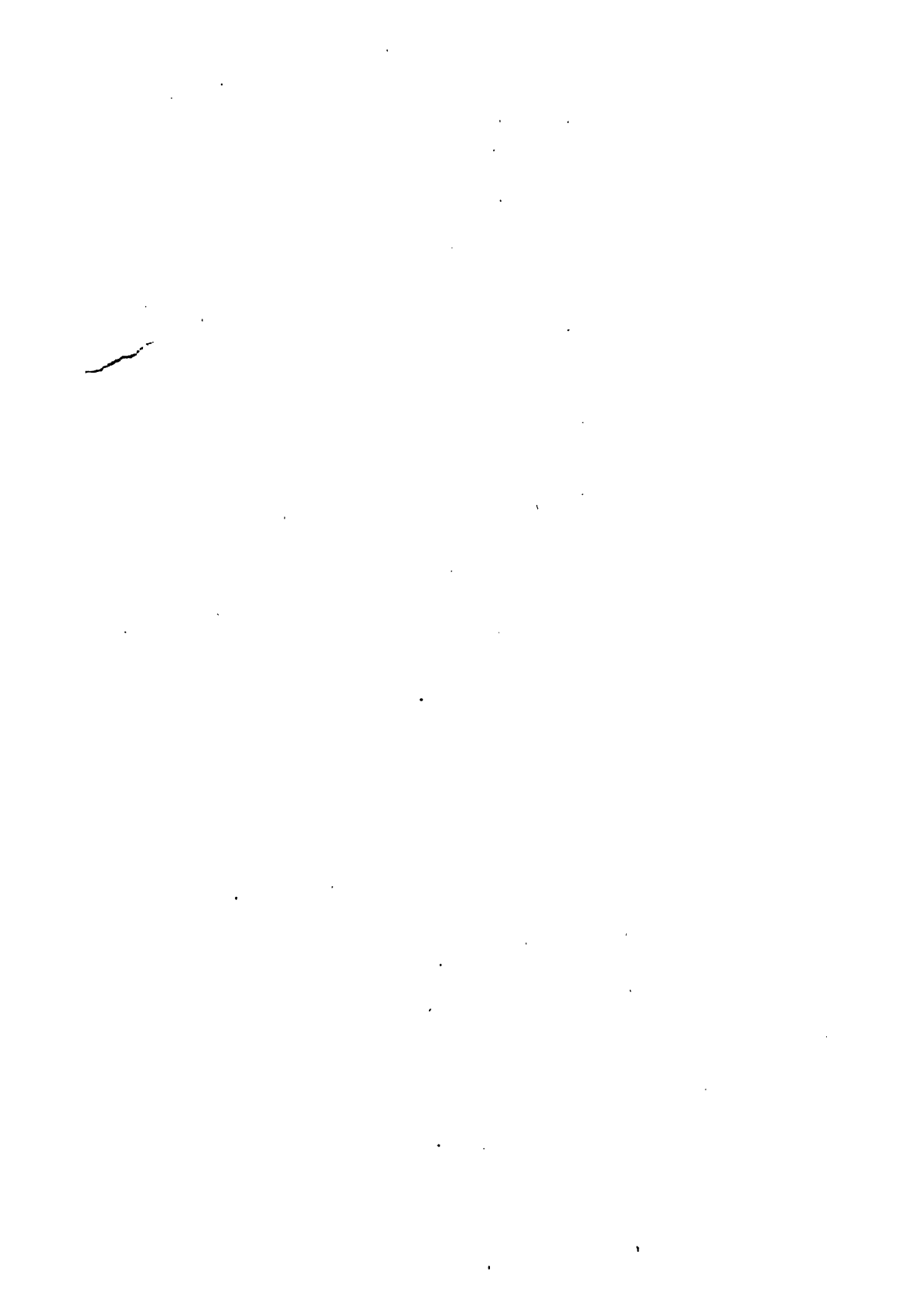
3. Where a parent divides his property among his sons, one of whom agrees to pay his sister a certain sum, *held*, in a suit by the daughter against the estate of the brother, that the father was a competent witness for her. *Fox v. Fox*..... 601

Work and Labor.

- Evidence in an action for work and labor, *held* to sustain verdict for defendant. *Flora v. Chapman* 741

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